No. (1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS,

Petitioners,

v.

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, Fifth Circuit, State Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

This Court previously held that the definition for a "vessel" is set forth in 1 U.S.C. section 3, which provides that **"[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water."** *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118 (2005); 1 U.S.C. Section 3 (emphasis added). There is a ***significant circuit split*** among federal and state courts post-*Stewart* (and pre-*Stewart*) on whether a dockside riverboat casino, built for, and capable of being used as, a means of transportation, constitutes a "vessel" under federal admiralty law, resulting in irregular application of federal law for hundreds of injured passengers each year. Although the riverboat in this case was built specifically for navigation, sailed countless times carrying hundreds of passengers, and is required to set sail upon certain conditions, the court of appeals concluded that the riverboat was not a "vessel" under federal admiralty law. In doing so, the court exacerbated an already large conflict between federal and state courts on the question of whether dockside riverboat casinos are "vessels."

The question presented here is:

Do dockside riverboat casinos constitute "vessels" under the Admiralty Extension Act, 46 U.S.C. section 30101?

LIST OF PARTIES

Petitioners, Jeffrey C. Bourgeois, Individually and on behalf of Dale Bourgeois, Mark Bourgeois, Ind. and on behalf of Dale Bourgeois, Rebekah L. Bourgeois, Individually and on behalf of Dale Bourgeois and Renee B. Bourgeois. Defendants, Boomtown, L.L.C. of Delaware, Pinnacle Entertainment, Inc. of Delaware, M/V BOOMTOWN BELLE II and Louisiana A-1 Gaming, A Louisiana Partnership in Commendam.

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OPINIONS BELOW

1) The 24th Judicial District Court for the State of Louisiana (Louisiana trial court) entered summary judgment on behalf of plaintiffs/applicants, finding that the defendant M/V BOOMTOWN BELLE was a "vessel" under federal admiralty law. *See* Summary Judgment, Appendix at App. 9.

2) The Louisiana Court of Appeal for the Fifth Circuit (appellate court) reversed the trial court's judgment, finding that the defendant M/V BOOMTOWN BELLE was *not* a "vessel" under federal admiralty law. *See* Judgment, Louisiana Fifth Circuit Court of Appeal, Appendix at App. 1.

3) The Louisiana Supreme Court (state court of last resort) denied plaintiffs Application for Supervisory Writ, thereby affirming the decision in favor of defendants/respondents. *See* Writ Denial, Appendix at App. 12.

BASIS FOR JURISDICTION IN THIS COURT

The Louisiana Supreme Court rendered a judgment on September 25th, 2009. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1 U.S.C. §3:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

46 U.S.C. §30101:

> The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to a person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land.

La. Rev. Stat. 27:44(23):

> "Riverboat" means a vessel which:
>
> (a) Carries a valid Certificate of Inspection issued by the United States Coast Guard with regard to the carriage of passengers on designated rivers or waterways within or contiguous to the boundaries of the state of Louisiana.
>
> (b) Carries a valid Certificate of Inspection from the United States Coast Guard for the carriage of a minimum of six hundred passengers and crew.
>
> (c) Has a minimum length of one hundred fifty feet.
>
> (d) Is of such type and design so as to replicate as nearly as practicable historic

> Louisiana river borne steamboat passenger vessels of the nineteenth century era. It shall not, however, be a requirement that the vessel be steam-propelled or maintain overnight facilities for its passengers.
>
> (e) Is paddlewheel driven.

La. Rev. Stat. 27:70(3):

> The applicant must demonstrate a proven ability to operate a vessel of comparable size and capacity and of comparable complexity to a riverboat so as to ensure the safety of its passengers. The applicant must demonstrate that each employee involved with navigation and passenger safety holds United States Coast Guard approved certification for lifeboat, firefighting, and first aid.

La. Rev. Stat. 27:65(B)(1)(c):

> For all licensees other than those licensed pursuant to R.S. 27:65(B)(1)(a) or (b), gaming may only be conducted on a riverboat while it is docked and the licensee shall not conduct cruises or excursions. A riverboat gaming licensee authorized to conduct gaming on a riverboat while it is docked pursuant to this Subparagraph shall pay the franchise fee in the amount provided in R.S. 27:91(C)(1) and the additional franchise fee in the amount provided in R.S. 27:91(C)(2).

Former La. Rev. Stat. 27:65:

* * *

B. Gaming shall be conducted aboard riverboats, subject to the following requirements:

(1) No gaming may be conducted while a riverboat is docked, unless the vessel is docked for less than forty-five minutes between excursions. However, should the master of the riverboat reasonably determine and certify in writing that the weather conditions or the water conditions are such that those conditions, which the master shall specify, present a danger to the riverboat, its passengers and crew, then the riverboat may remain docked and gaming may take place until such time as the master determines that those conditions have sufficiently diminished to proceed or until the duration of the authorized excursion has expired.

La. Rev. Stat. 27:81:

The board shall issue a permit to any person who provides maritime crew, staff, or maritime services, including consulting services involving maritime issues, directly related to the maintenance and operation of a riverboat. The person or, if the person is a corporation or firm, an officer of the corporation or firm furnishing such crew or such maritime services shall possess, as a minimum, credentials equivalent to those

> required by the United States Coast Guard to be licensed as a master, chief engineer, or pilot. Any person offering to provide maritime crew, staff, or such direct maritime services after October 1, 1999, shall be issued a permit in accordance with the provisions of this Subsection prior to providing such crew, staff, or maritime services to a riverboat.

STATEMENT OF THE CASE

Plaintiffs/applicants submit to this Court that *compelling* reasons exist for granting its application for Writ of Certiorari. Federal and state courts alike have struggled with the definition of "vessel" for docked riverboat casinos, particularly after this Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005), such that there is contradictory application of federal admiralty law for injured passengers, resulting in a circuit split and disjointed decisions between courts at every level. These riverboat casinos are substantively identical in nature, and ***the circuit split is based on a contradictory application of federal law, only***. For example, the U.S. Eleventh Circuit, U.S. Seventh Circuit and various federal and state district courts found that dockside riverboat casinos constitute "vessels" under federal admiralty law pursuant to *Stewart*, while the U.S. Fifth Circuit and various federal district and state courts held that they are *not* vessels under *Stewart*. *See, e.g., Board of*

Commissioners of Orleans Levee District v. M/V Belle of Orleans, 535 F.3d 1299 (11th Cir. 2008) (Louisiana dockside riverboat casino *is* a "vessel" under *Stewart*); *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012 (7th Cir. 2006) (Illinois dockside riverboat casino *is* a "vessel" under *Stewart*); *In re AMGAM Assn.*, 239 B.R. 737 (S.D. MS 1999) (Mississippi riverboat casino *is* a "vessel" under federal admiralty law); *Credit Suisse First Boston Mortgage Capital, LLC v. Doris,* 102 F.Supp.2d 709, 713 (N.D. MS 2001) (Mississippi riverboat casino *was* a "vessel" as defined by 1 U.S.C. §3); *Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N.E.2d 141, 146 (Ill. 3d Cir. 2006) (pursuant to *Stewart,* defendant riverboat casino is a "vessel," despite that it "stopped cruising [in] 1999, the day after the law changed to allow gambling to occur [dockside] and has no plans to resume cruising, [because] [t]he Alton Belle is clearly **capable** of maritime transportation") (emphasis added). *But see De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006) (Louisiana dockside riverboat casino *not* a vessel under *Stewart*, relying upon pre-*Stewart Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) (Mississippi riverboat casino not a "vessel" under general maritime law or Jones Act); (*Davis v. Players Lake Charles Riverboat,* 74 F.Supp.2d 675, 676 (W.D. La. 1999) (Louisiana riverboat casino is *not* a "vessel" under admiralty law)); *In re Silver Slipper Casino Venture, LLC*, 264 Fed. Appx. 363 (5th Cir. 2008) (Mississippi riverboat casino *not* a vessel because "*Stewart* did not expand

the term [vessel] to include permanently-moored casinos").[1]

Perhaps even more absurd is that courts have even issued split decisions ***with respect to the identical boat!*** *See, e.g., Breaux v. St. Charles Gaming,* Case No. 2005-000272, (14th JDC, State of Louisiana 2007) (Louisiana riverboat casino "Crown Casino" *is* a "vessel" under *Stewart*); *De La Rosa v. St. Charles Gaming Co.,* 474 F.3d 185 (5th Cir. 2006) (Louisiana riverboat casino "Crown Casino" is *not* a "vessel" under *Stewart*).[2, 3] Plaintiffs suggest to this

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[1] Courts create additional confusion and inconsistent opinions as to whether dockside riverboat casinos are "vessels" when deciding Jones Act claims. *See, e.g., Martin v. Boyd Gaming*, 252 F.Supp. 321 (E.D. La. 2003) (used the terms "vessel" under admiralty law and "vessel in navigation" for Jones Act interchangeably to deny plaintiff's Jones Act claim); *Davis v. Missouri Gaming*, 51 S.W.3d 168 (W.D. App. Mo. 2001) (dockside riverboat casino *may* be "vessel" for Jones Act claim as it was built for navigation and floated); *Howard v. Southern Illinois Riverboat Casino Cruises*, 364 F.3d 854 (7th Cir. 2004) (regardless of the outcome in *Stewart*, Illinois dockside riverboat casino is *not* a vessel "in navigation" under Jones Act); *Hertz v. Treasure Chest Casino*, 274 F.Supp. 795 (E.D. La. 2003) and *Watson v. Indiana Gaming Co.*, 337 F.Supp.2d 951 (E.D. KY 2004) (dockside riverboat casinos were *not* "vessels in navigation" under Jones Act).

[2] Ironically, counsel for the Louisiana riverboat M/V Crown Casino in *Breaux* (where LA district court found it *was* a vessel, writs denied by both LA appellate court and LA Supreme Court), is the exact counsel for defendant here, Louisiana riverboat casino M/V BOOMTOWN BELLE (wherein Louisiana appellate court reversed the trial court to find that defendant is *not* a vessel). Predictably, but nevertheless unjustly, on information

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Honorable Court that lower courts have sufficiently percolated on this issue such that two very diverse philosophies and interpretations have emerged – resulting in a complete lack of uniformity with respect to decisions and application of law. ***It is critical that the U.S. Supreme Court step in and resolve this issue at this time.***

Defendant, the M/V BOOMTOWN BELLE, is a fully operational riverboat lying afloat on a navigable waterway (the "Harvey Canal"), which has sailed countless times. *See* Appendix at App. 33, 1/7/09 Letter from Lt. Commander S.R. Keel, U.S. Coast Guard to Williams Law Office. Not only does Louisiana law specifically require the M/V BOOMTOWN BELLE to be ***capable of navigation*** at all times

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and belief, such counsel recently offered the *Breaux* plaintiff a settlement amount for defendant's tortuous conduct (in a nearly identical fact pattern as this case), but has refused to offer plaintiff a cent for defendant's tortuous conduct here, because of the LA appellate court's decision that defendant is not a "vessel" under *Stewart*. Plaintiffs/applicants submit to this court that plaintiffs will continue to have irregular recovery for identical injuries unless this Court steps in to clarify the split in the circuits and the definition of "vessel" as it applies to dockside riverboat casinos.

[3] Even the Louisiana Supreme Court has taken a contradictory position on this issue: in this case, the Louisiana Supreme Court denied writs to review the Louisiana Fifth Circuit's decision which found defendant was *not* a vessel under *Stewart*. However, the Louisiana Supreme Court also denied writs to review the Louisiana Third Circuit's decision that a Louisiana riverboat casino *was* a vessel under *Stewart*. These riverboats, by state law requirements, are substantively identical.

and licensed by the U.S. Coast Guard, **but the U.S. Coast Guard specifically requires the M/V BOOMTOWN BELLE to set sail upon *"gale force winds"* during a hurricane**. *See* La. Rev. Stat. 27:44(23); 7/13/09 Letter from Captain E. M. Stanton, U.S. Coast Guard, to Parish President A. Broussard, Jefferson Parish, State of Louisiana, Exhibit "D." The Harvey Canal is located just adjacent to the Mississippi River and the City of New Orleans (and just miles from the Gulf of Mexico) – as such, hurricanes, levee protection, and flood control are significant issues impacting commerce in the port city of New Orleans and it surrounding area, requiring the removal of all vessels in the Harvey Canal under certain conditions. *See, e.g.*, U.S. Army Corps of Engineers "Team New Orleans" website home page, Appendix at App. 19; 7/13/09 Letter from Captain Stanton to A. Broussard, Parish President of Jefferson Parish, State of Louisiana, Appendix at App. 16.

In 1991, Louisiana law provided for 15 riverboat gaming licenses to be distributed to 15 operators to allow limited gambling on riverboats ***required to sail***. *See* Act 753 of the 1991 legislative session, enacted into former La. Rev. Stat. 27:65. Accordingly, M/V BOOMTOWN BELLE was ***built*** as a navigable casino riverboat, and sailed on its own to its present location, the Harvey Canal. The boat loaded passengers and set sail countless times.

In 2001, Louisiana law was amended to now require those riverboat casinos to remain *dockside* while conducting gaming activities, and completely

revamped and re-wrote its code relating to riverboats. *See, e.g.*, La. Rev. Stat. 27:65. Significantly, Louisiana reaffirmed its intent to require riverboat casinos to be capable of transportation and rejected proposals to make them "permanently moored vessels withdrawn from navigation." *See* proposed Louisiana Legislation which failed at Appendix at App. 28. For example, Louisiana law continued to specifically require the M/V BOOMTOWN BELLE to remain a fully operational seagoing vessel for the carriage of a ***minimum*** of 600 passengers.

> "Riverboat" ***means a vessel*** which:
>
> (a) **Carries a valid Certificate of Inspection issued by the United States Coast Guard *with regard to the carriage of passengers on designated rivers or waterways*** within or contiguous to the boundaries of the state of Louisiana.
>
> (b) **Carries a valid Certificate of Inspection from the United States Coast Guard *for the carriage of a minimum of six hundred passengers and crew.***
>
> (c) Has a minimum length of one hundred fifty feet.
>
> (d) Is of such type and design so as to replicate as nearly as practicable historic Louisiana river borne steamboat passenger vessels of the nineteenth century era. It shall not, however, be a requirement

> that the vessel be steam-propelled or maintain overnight facilities for its passengers.
>
> (e) ***Is paddlewheel driven.***

See La. Rev. Stat. 27:44(23) (emphasis added). *See also*, La. Rev. Stat. 27:70 (wherein the legislature deleted and amended large sections of this statute, but specifically retained the requirement that applicants for gaming licenses "must demonstrate a proven ability to **operate a vessel of comparable size** and capacity and of comparable complexity to a riverboat so as to ensure the **safety of its passengers**. *The applicant must demonstrate that* ***each employee involved with navigation and passenger safety holds United States Coast Guard approved certification for lifeboat***, fire-fighting, and first aid") (emphasis added); La. Rev. Stat. 27:81 ("[t]he board shall issue a permit to any person who provides **maritime crew, staff, or maritime services,** including consulting services involving maritime issues, directly related to the maintenance and operation of a riverboat. The person or . . . firm furnishing such crew or such maritime services shall possess, as a minimum, **credentials equivalent to those required by the United States Coast Guard to be licensed as a master, chief engineer, or pilot**") (emphasis added).

Conversely, as noted above, **Louisiana law-makers considered, and specifically *rejected* the proposal "[t]o provide that a riverboat includes**

a continuously moored vessel determined to be removed from navigation" and to remove the requirement for a U.S. Coast Guard Inspection certificate. *See* HB2022, Appendix at App. 28.

It is not disputed that the M/V BOOMTOWN BELLE is a Louisiana licensed riverboat casino pursuant to the above Louisiana law, licensed and inspected by the U.S. Coast Guard ***for the carriage of 2,461 passengers and crew***, was built for navigation and sailed countless times. *See* Certificate of Inspection, Appendix at App. 22. In approximately 2001, the M/V BOOMTOWN BELLE moored to the dock to conduct gaming pursuant to a change in Louisiana law, and receives certain utilities shoreside while docked. However, **the M/V BOOMTOWN BELLE at all times was required to remain "capable of navigation."** *See* La. Rev. Stat. 27:44(23). The United States Coast Guard explained "[t]he M/V Boomtown Belle, II was continuously moored in accordance with the Certificate of Inspection and ***the vessel could navigate or set sail as needed with the proper preparations made which includes contacting the OCMI New Orleans prior to getting underway.***" *See* Lt. Commander Keel's Response to Freedom of Information Act Request, 1/14/09, Appendix at App. 31 (emphasis added). Further, to obtain the Certificate of Inspection from the United States Coast Guard, the M/V BOOMTOWN BELLE II is required to: **employ a marine crew licensed by the U.S. Coast Guard,**

maintain mandatory insurance coverage for a fully operational vessel, and **undergo quarterly inspections,** and must meet all of Louisiana state law requirements to maintain a "maritime" license as set forth above.

Defendants argue that the M/V BOOMTOWN BELLE is "permanently moored [and its] use as a 'means of transportation on water' is not a practical possibility and is merely theoretical," because the owner has no ***desire*** to set sail due to gaming operations, and because it receives shoreside utilities. However, this gross and knowing misrepresentation is underscored by the U.S. Coast Guard's clear directives to the M/V BOOMTOWN BELLE:

> "Coast Guard Sector New Orleans officials met with the Southeast Louisiana Flood Protection Authority on January 16, 2009 to discuss areas of concern for the upcoming hurricane season. * * * In response to concerns raised at this meeting, **the Coast Guard will take all actions necessary to *prohibit all vessels from . . . the Harvey Canal*** [and] these designated areas shall not be used as a safe haven. **The requirements will be in effect 24 hours prior to expected gale force winds through post-storm landfall, or other conditions as determined by the Captain of the Port.** If necessary, the Captain of the Port is prepared to issue specific order directed at lingering vessels."

See 4/10/09 Letter from U.S. Coast Guard to State of Louisiana, Ms. E.A. Wills, P.E., Appendix at App. 37 (emphasis added). Thereafter, the Coast Guard specifically advised regarding the M/V BOOMTOWN BELLE:

> Based on events that occurred during Hurricanes Gustav [in 2008] and Katrina [in 2005], **the Coast Guard has proposed a regulation which would prohibit floating vessels from being present in the Harvey Canal ... before a hurricane. Simply put, prior to the arrival of storm force winds, *all floating vessels must be removed from the Harvey Canal or sunk in place. This includes the Boomtown Casino.* The proposal is meant to protect the Harvey Canal levee (and eventually the new floodwall) from damage by vessel that may be moved by a storm surge.**

See 7/13/09 Letter from Captain E.M. Stanton, U.S. Coast Guard, to Parish President A. Broussard, Jefferson Parish, State of Louisiana, Appendix at App. 16 (emphasis added).[4]

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[4] While the Coast Guard acknowledges that a vessel in the Harvey Canal has the option of being "sunk in place" rather than sailing out, plaintiffs doubt that even defendants would attempt to suggest to this Court that it would choose to "sink" its multi-million dollar boat with millions of dollars of gaming equipment to avoid setting sail.

The M/V BOOMTOWN BELLE has a fully operational diesel engine, boat crew, navigation equipment, lifeboats, life rafts, hull exams and meets all requirements of the U.S. Coast Guard to maintain a current vessel license. *See* U.S. Coast Guard Certificate of Inspection, Appendix at App. 22. It has carried passengers and sailed countless times. It is required to set sail upon "gale force winds" during a hurricane. Its ability to sail is not only a "practical possibility," but given the geographic location of the M/V BOOMTOWN BELLE in southeast Louisiana (just adjacent to New Orleans), just miles from the Gulf of Mexico, and hundreds of feet from the Mississippi River, it is a "practical probability" that "gale force winds" will enter the Gulf of Mexico pursuant to a hurricane, and the M/V BOOMTOWN BELLE will *have* to set sail. Further the M/V BOOMTOWN BELLE can cut its moorings and set sail within approximately 4 hours, if not sooner.

Defendants maintain a strict policy of offering every passenger an alcoholic beverage free, or at very reduced prices, every 20 minutes, encouraging intoxication well over the legal limit, in order to keep their passengers "happy". *See* Deposition of D. Davis, M/V BOOMTOWN BELLE Food and Beverage Manager, Appendix at App. 40. Obviously, the intent is to pry passengers with liquor in order to impair their judgment over spending money, with little to no concern for the safety and/or well-being of the passenger – or any innocent bystander on the roadway upon the passenger's drunken and impaired

return home. On July 20, 2007, plaintiff Jeffrey Bourgois entered the defendants' boat sober and was served cocktails pursuant to the above policy. Approximately 4 hours later, plaintiff exited the boat to go home, whereupon he was killed ¼ of a mile from the boat in a car accident as a result of his severe intoxication. Plaintiffs filed this instant action pursuant to the Admiralty Extension Act against the defendant M/V BOOMTOWN BELLE.

REASONS FOR GRANTING THE WRIT

The Admiralty Extension Act provides that

> admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, **caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land**.

Admiralty Extension Act, 46. U.S.C. § 30101 (emphasis added). The United States Supreme Court explained that "[t]he purpose of the Act was to end concern over the sometimes confusing line between land and water, by investing admiralty with jurisdiction over **'all cases' where the injury was caused by a ship or other vessel on navigable water, *even if such injury occurred on land.*"** *Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532, 534, 115 S.Ct. 1043, 1048-49 (1995) (emphasis

added). *Grubart* held that admiralty jurisdiction exists pursuant to the Admiralty Extension Act when a two-prong test is satisfied:

a) **"Location":** A court applying the location test must determine whether the tort occurred on navigable waters or whether injury suffered on land was caused by ***a vessel on navigable water***;

b) **"Connection with maritime activity"** – i) A court, first, must 'assess the general features of the type of incident involved' to determine **whether the incident has 'a *potentially* disruptive impact on maritime commerce' *and*** ii) a court must determine whether the 'general character' of the 'activity giving rise to the incident' **shows a 'substantial relationship to traditional maritime activity'**.

Grubart, 513 U.S. at 534, 115 S.Ct. at 1048 (emphasis added).

I. THE M/V BOOMTOWN BELLE SATISFIES THE "LOCATION" TEST BECAUSE IT IS A "VESSEL ON NAVIGABLE WATER."

In 2005, this Court held that **the definition provided in 1 U.S.C. §3 *is the applicable definition for "vessel" status for general maritime law***. *Stewart v. Dutra Construction Co.,* 543 U.S. 481, 489, 125 S.Ct. 1118, 1124 (2005) ("Section 3 merely codified the meaning that the term 'vessel' had acquired in general maritime law") (citing

Benedict on Admiralty, §165 (rev. 7th ed. 2004)) (emphasis added). *See also Board of Commissioners of Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299, 1309 (11th Cir. 2008) ("*Stewart's* core holdings were that 1 U.S.C. §3 is a codification of the general maritime law and provides the definition of 'vessel' throughout the United States Code").

Section 3 provides that **"[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, *or capable of being used*, as a means of transportation on water."** 1 U.S.C. §3 (emphasis added). *Stewart* emphasized that "vessel" under 1 U.S.C. §3 "sweeps broadly," and does not require that the watercraft be "in navigation" at the time of the injury. *Stewart*, 543 U.S. at 494-95, 125 S.Ct. at 1127-28. A finding of "vessel" status

> requires only that a watercraft be ***'used or capable of being used, as a means of transportation on water'*** to qualify as a vessel. **It does not require that a watercraft be used primarily for that purpose.**
>
> * * *
>
> Also, a watercraft need not be in motion to qualify as a vessel. . . .

Stewart, 543 U.S. at 495, 125 S.Ct. at 1128 (emphasis added) (holding that a work platform with no means of self-propulsion was a "vessel"). *See also BELLE OF ORLEANS*, 535 F.3d at 1306 ("[o]ur determination

[that] the [Louisiana riverboat casino] BELLE OF ORLEANS is a 'vessel' is guided by the Supreme Court's decision in *Stewart*"); *Holmes v. Atlantic Sounding Co.*, 437 F.3d 441, 448 (5th Cir. 2006) (under *Stewart*, as long as a water-borne structure is *practically capable* of being used for transportation on navigable waters, it is a "vessel").

Because "a watercraft need not be in motion to qualify as a vessel under §3 [it] does not pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident." *Stewart*, 543 U.S. at 495, 125 S.Ct. at 1128. "Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Id.* This Court explained that

> [t]he 'in navigation' requirement is an ***element*** of the vessel status of a watercraft. It is relevant to whether the craft is 'used, or capable of being used' for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one. In some cases that inquiry may involve factual issues for the jury.

Id. (emphasis added). Pursuant to these factors, *Stewart* held that a floating platform which had no engine and had to be towed to move long distances was a "vessel". *Stewart*, 543 U.S. at 490-97, 125 S.Ct. at 1124-29.

Pursuant to *Stewart*, a Louisiana riverboat casino indefinitely moored dockside was held to be a "vessel" under federal admiralty jurisdiction. *Belle of Orleans,* 535 F.3d at 1313 (citing *Stewart*, 543 U.S. at 494, 497, 125 S.Ct. at 1118). The *Belle of Orleans* court recognized that

> ***Stewart's* core holdings were that ... a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit[;] *the focus of the 'vessel' inquiry is the craft's capability, not its present use or station.*** ...
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> * * *
>
> **The owner's intentions with regard to a boat are analogous to the boat's 'purpose,' and *Stewart* clearly rejected any definition of 'vessel' that relies on such a purpose.** Further, such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction.

Id. at 1310-11. *See also Davis v. Missouri Gaming Company d/b/a Argosy Riverside Casino*, 51 S.W.3d 168, 174 (defendant's "intention to permanently moor

the Argosy IV[, a riverboat casino,] is not determinative of whether the Argosy IV remains a vessel in navigation," and remanded for further fact inquiry).

In *Belle of Orleans*, the Louisiana riverboat casino had been moored dockside since 2001 when Louisiana law changed to require such boats to remain dockside while "gaming." *Id.* at 1303-04. The court found that

> [w]hen the BELLE OF ORLEANS began operating dockside in 2001, her owners added steel cables to her mooring system and attached electrical, computer and phone cables from a shore-side source. * * * The affidavit of the . . . chief engineer . . . characterized [her] . . . as 'permanently moored' and 'out of operation.' * * * The Coast Guard reduced the BELLE OF ORLEANS' manning requirements based upon her owner's 'stated intent to operate in a continuously moored status' [and] limited [her] to 'permanently moored operation' but did not prohibit [her] from navigating in the future.
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> The BELLE OF ORLEANS was subject to Coast Guard certification and inspection. * * * In order to be eligible for Coast Guard documentation, the Belle of Orleans must be a "vessel,' defined by 46 C.F.R. sec. 67.3 as 'every description of watercraft or other contrivance capable of being used as a means of transportation on water, but does not include aircraft.'

* * *

> The BELLE OF ORLEANS maintained a captain and a crew . . . and maintained her engines, generators and equipment in working order. . . .

Id. at 1303-04. During Hurricane Katrina, the BELLE OF ORLEANS broke free of her moorings and caused damage to plaintiff's marina. *Id.* at 1304.

In addressing the defendant's argument that it was not a vessel because it had remained dockside since 2001 with the change in Louisiana law, the court explained that the M/V BELLE OF ORLEANS remained a vessel *after* 2001, because **"the [boat] was [not] rendered practically incapable of transportation or movement when her owner moored her in 2001. * * * [A]ll her crew would have had to do was unmoor her cables and start up her engine and [she] would have been able to sail".** *Id.* at 1311-12 (emphasis added) (citing *Stewart*, 543 U.S. at 494, 125 S.Ct. at 1118). The court also noted that she was "towed" to Alabama for repairs, which also met the "vessel" test for admiralty jurisdiction. *Id.* The court explained that

> *Stewart* . . . stated a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.
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> Both the Fifth and the Seventh Circuits have addressed the meaning of 'permanently

> moored or otherwise rendered practically incapable of transportation or movement' post-*Stewart* [citing] *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006) and *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006). Under the language of *Stewart*, however, we find that neither court articulates an appropriate test. **Both focus on the intent of the shipowner rather than whether the boat has been 'rendered practically incapable of transportation or movement.'** ***The owner's intentions with regard to a boat are analogous to the boat's 'purpose', and Stewart clearly rejected any definition of 'vessel' that relies on such a purpose. Further, such a test in incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction.*** **Under *Tagliere* and *De La Rosa*, a boat may enter and leave admiralty jurisdiction on the basis of state law and the individual thoughts of the boat owner. . . . With this in mind,** ***we will place our primary focus, as Stewart directs, on whether the BELLE OF ORLEANS was 'rendered practically incapable of transportation or movement' when her owner moored her in 2001.***

Id. at 1311-12 (emphasis added).[5]

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[5] Further, the *Belle of Orleans* court found that it was bound by a previous U.S. Fifth Circuit decision which found that

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Similarly, the United States Seventh Circuit ruled that the defendant Illinois riverboat casino remained a "vessel" despite that it had been moored to a pier for over two (2) years pursuant to Illinois law allowing it to conduct gaming activities "dockside." *Tagliere v. Harrah's Illinois Corp.*, 445 F.3d 1012, 1013-14 (7th Cir. 2006). In *Tagliere*, a casino patron fell off a stool and injured herself, suing in admiralty. In evaluating the claim, the court explained that

> [t]he accident in our case had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land. * * * There is ... commonsense appeal to the district court's ruling that the suit is not within the admiralty jurisdiction. **But the most important requirement of a jurisdictional**

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a Navy salvage vessel that had been converted into a shrimp processing plant with no engine or crew, received all utilities shoreside and was moored to a dock by steel cables, was nonetheless a "vessel" because it was "capable of navigation". *Belle of Orleans,* 535 F.3d at 1306, 1309 (citing *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955).[5] The *Belle of Orleans* court rejected the defendant's argument that it was bound by the pre-*Stewart* Fifth Circuit decision "*Pavone,*" which held that a Mississippi barge casino never constructed for navigation was not a "vessel", because that case involved a Jones Act claim and because the riverboat casino in *Pavone* was factually different from the BELLE OF ORLEANS. *Id.* at 1307-09 (citing *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995)).

> **rule is not that it appeal to common sense but that it be clear.**

Id. at 1013 (emphasis added). In finding jurisdiction under the Admiralty Extension Act, the court explained that ***"there has been no showing that the boat in our case, though stationary for the past two years, is permanently moored in the Court's sense (disabled from sailing)" and thus is the equivalent of a landfill.*** *Id.* at 1014 (emphasis added) (citing *Stewart*, 543 U.S. 481, 125 S.Ct. 1118 (2005)). *See also Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N.E.2d 141, 146 (Ill. 3d Cir. 2006) (pursuant to *Stewart,* defendant riverboat casino is a "vessel," despite that it "stopped cruising [in] 1999, the day after the law changed to allow gambling to occur [dockside] and has no plans to resume cruising, [because] [t]he Alton Belle is clearly **capable** of maritime transportation") (emphasis added).

The U.S. Fifth Circuit recognized that *Stewart* **"significantly enlarged the set of unconventional watercraft that are vessels,"** and **"no longer required an inquiry into the purpose for which a watercraft is constructed or the business in which the craft is engaged; rather *the only inquiry is whether the craft is 'practically capable of being used for transportation.'"***) *Holmes,* 437 F.3d at 448 (citing *Stewart*, 543 U.S. at 481) (emphasis added). The *Holmes* court interpreted:

> **[under] "pre-*Stewart* 'vessel' jurisprudence** . . . the term 'vessel' connotes a structure designed or used for **'transportation for passengers, cargo or equipment** from place to place across navigable waters. 'As a general principle, **where the vessel status of an unconventional craft is unsettled, it is necessary to focus upon the purpose for which the craft is constructed and the business in which it is engaged.'**
>
> * * *
>
> **[However, *under post*]-*Stewart*, *as long as a water-borne structure is practically capable of being used for transportation on navigable waters, it is a 'vessel'.*** As noted, *Stewart* has significantly enlarged the set of unconventional watercraft that are vessels under the Jones Act and the LHWCA [to be] ***any watercraft practically capable of maritime transportation*, regardless of its primary purpose *or state of transit at a particular moment*.**

Id. at 446, 448 (emphasis added). *See also Bunch v. Canton Marine Towing Co., Inc.*, 419 F.3d 868 (8th Cir. 2005) ("[t]he *Stewart* Court . . . specifically eschewed tests for vessel status focused on either a craft's 'primary purpose' or whether the craft is in 'actual transit' at the time of an accident . . . and focus instead on whether the [structure] was 'used, or capable of being used, as a means of transportation on water' ").

Thus, pursuant to *Stewart*, the *Holmes* court reversed an earlier decision wherein it found that a barge was *not* a "vessel," and found that the barge at issue before it *was* a vessel. *Id.* at 443-44, 448-49 (5th Cir. 2006) (emphasis added) (citing *Stewart*, 543 U.S. at 481).[6] Yet, despite the United States Fifth Circuit's clear analysis of the *Stewart* decision above, it nevertheless held that riverboat casinos are *not* vessels, citing *Pavone*, 52 F.3d at 560. *De La Rosa*, 474 F.3d at 186. The Court found that "although the Crown Casino was still capable of sailing, such a use was merely theoretical, because "defendants do not intend to use it as [a seagoing vessel]. *Id. See also Pavone*, 52 F.3d at 569 ("there can be little doubt that indefinitely moored, shore-side, floating casinos, such as the BILOXI BELLE, must be added to that list [of non-vessels]").

In the case sub judice, the Louisiana Fifth Circuit recognized that "for general maritime law to apply,

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[6] Even pre-*Stewart*, various unconventional structures were held to be "vessels" despite that they had no engines, could not sail, and were moored to a dock, such as houseboats, work platforms and dry-docked boats. *See, e.g.*, *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955) (navy ship converted into shrimp processing plant that "had no motive power of its own, no steering mechanism, but . . . was capable of being towed" was a "vessel"); *Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht*, 625 F.2d 44, 47 (5th Cir. 1989) (yacht test-sailed then placed in dry storage was "vessel"); *M/V Marifax v. McCorry*, 391 F.2d 909, 910 (5th Cir. 1968) ("even fifteen years of resting inertia does not necessarily destroy navigability"); *Miami River Boat Yard, Inc. v 60' Houseboat*, 390 F.2d 596, 597 (5th Cir. 1968) (houseboat with no motive power and must be towed is a vessel).

the evidence must reflect that the vessel in question was in navigation ***or capable of navigation***." *See* Opinion at 3, attached hereto as Appendix Document "2" (emphasis added). The Louisiana Fifth Circuit further found that the M/V BOOMTOWN BELLE "is permanently attached to land by 'dolphins welded to steel pilings' [and] receives utilities from 'land-based sources,' which are fixtures permanently attached to the vessel". *See* Louisiana Court of Appeal for the Fifth Circuit Opinion at 3, Appendix at App. 1. The court concluded that the BOOMTOWN BELLE had been "permanently moored or otherwise rendered incapable of transportation or movement" since 2001, and that "a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered incapable of transportation or movement."[7] *Id.* at 3. (citing La. Rev. Stat. 27:65(B)(1)(c)) and *Stewart*, 543 U.S. at 494, 125 S.Ct. at 1127). Thus, the Louisiana Fifth Circuit found that the M/V BOOMTOWN BELLE is no longer "capable of navigation", which

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[7] Oddly, the court incorrectly found that "[t]here is no dispute that the Boomtown casino is located on a barge, which is permanently moored to a dock." *Id.* at 3. First, the M/V BOOMTOWN BELLE is ***NOT*** "located on a barge," nor do even defendants contend such a thing! Rather, the BOOMTOWN BELLE was constructed as, and remains, a fully functioning vessel with diesel engines, a captain, a crew, and has sailed countless times with hundreds of passengers. Louisiana law **specifically prohibits** riverboat casinos to be located on barges. *See* La. Rev. Stat. 27:44(23); Louisiana House Bill No. 2022, Appendix at App. 28. Authored by Rep. Hunt Downer (rejected) (Rep. Downer attempted to allow riverboat casinos to be located on ***barges***; the legislature specifically rejected this proposal).

simply is not true – factually or legally – and is in direct conflict with the United States Supreme Court's decision in *Stewart* as well as the United States Court of Appeals decisions in *Belle of Orleans* and *Tagliere*.

First, ***all Louisiana casino riverboats must be capable of navigation or they lose their gaming license***. *See* La. Rev. Stat. 27:44(23). The M/V BOOMTOWN BELLE II was ***specifically built for navigation***, as it was built when Louisiana law ***required*** riverboat casinos to sail in order to maintain a gaming license. It was built with, and continues to maintain pursuant to law, a fully operational diesel engine, boat crew, navigation equipment, lifeboats, life rafts, hull exams and meets all requirements of the U.S. Coast Guard to maintain a current vessel license. In fact, **defendants do not even dispute that the M/V BOOMTOWN BELLE routinely carried passengers and sailed, or that it *could* sail as of this moment if it so desired**. Thus, the appellate court below wrongfully concluded that the M/V BOOMTOWN BELLE has been "otherwise rendered incapable of transportation or movement" simply because it is moored to a dock. In fact, **under the Fifth Circuits' logic, *any* boat which is docked at a marina which could set sail within a matter of hours of preparation is no longer a "vessel" under admiralty law.**[8] This simply is

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[8] Notably, *all* boats, pleasure and commercial, which are docked receive "shoreside" utilities such as electricity, and such land-based utilities do not render the boat "incapable of transportation".

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incongruent with uniform federal admiralty law which routinely holds that even pleasure boats docked at a marina are "vessels" for jurisdiction thereunder.

Further, the M/V BOOMTOWN BELLE is required to move upon gale force winds in the Gulf of Mexico upon a hurricane. Thus, it is a probability, regardless of the owners' intent or desire, that the boat will set sail at the next hurricane season. *See* Letters from U.S. Coast Guard, Appendix at App. 16, 37; U.S. Army Corps of Eng. Team New Orleans website, Appendix at App. 19.

B. THE M/V BOOMTOWN BELLE HAS A "CONNECTION WITH MARITIME ACTIVITY."

In *Grubart*, the U.S. Supreme Court evaluated two factors when deciding whether a watercraft has a "connection with maritime activity": a) whether the incident involved had potential to disrupt maritime commerce; and b) whether the general character of the activity of the watercraft shows a substantial relationship to maritime activity. *Grubart*, 513 U.S. at 539, 115 S.Ct. at 1051. Applying that test, *Grubart* found admiralty jurisdiction over defendant's pile-driving **from a crane** which rested on a stationary

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Again, if the Fifth Circuit's logic is adopted, then all pleasure boats, for example, which rest at the marina most of the winter and are attached to dockside electricity, are no longer "vessels". Regarding the BOOMTOWN BELLE's mooring system, the "weld attached to steel pilings" serves as a ***stabilizing*** factor for the boat, not so that it can avoid federal admiralty law. These moors can be cut, just as other boats are unmoored from their dock, in short time and the boat can sail in a matter of hours.

barge on a navigable waterway. *Id.* at 548, 1055. Because the crane caused damage to a structure beneath a riverbed which required the waterway to be closed to repair the damaged structure, the Court found that the incident had the *potential* to disrupt maritime commerce. Further, because "the wrong here involves the negligent operation of a vessel on navigable waters," the court found a "sufficient nexus to traditional maritime activity."

a. INTOXICATED PASSENGERS ON A SHIP SUCH AS THE M/V BOOMTOWN BELLE HAVE THE POTENTIAL TO DISRUPT MARITIME ACTIVITY.

In determining whether the incident involved had "potential to disrupt maritime commerce," the *Grubart* court noted this was a ***theoretical concept***, where the court should determine if ever the tort *could* disrupt maritime commerce, not whether in the particular case at bar it actually *did*. *Id.* at 538 (citing *Sissone v. Ruby*, 497 U.S. at 363, 110 S.Ct. at 2896). *See also Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 386 (7th Cir. 2001) ("[t]he key is not whether the incident affected maritime commerce, but where it *could* do so," finding that injured employee aboard riverboat casino disrupts its participation in maritime commerce).

Thus, the United States Seventh Circuit found that the riverboat casino patron's injuries in falling off her gambling stool was within admiralty jurisdiction, because "even an injury to a passenger could have a disruptive effect, if the boat had to make an unscheduled stop to get him to a hospital (not that

that could have happened here, since the boat was moored), or if the injury revealed a dangerous condition that required time-consuming repairs." *Tagliere,* 445 F.3d at 1015.

The Supreme Court of Iowa held that when the sale and service of alcohol to an intoxicated adult occurred on a vessel capable of transporting passengers in a navigable waterway, the *Grubart* "location" test for concurrent admiralty jurisdiction is satisfied. *Horak v. Argosy Gaming Co.,* 648 N.W.2d 137, 146 (Iowa 2002) (citing *Grubart*, 513 U.S. at 534, 115 S.Ct. at 1035). In *Horak,* a riverboat casino patron died due to intoxication in a single vehicle collision after being served alcohol by casino employees. *Id.* at 146. The *Horak* Court held that the incident satisfies the two prongs of *Grubart's* "connection" test as the alleged wrong had a "potentially disruptive impact on maritime commerce" and "shows 'a substantial relationship to traditional maritime activity.'" *See also Duluth Superior Excursions,* 623 F.2d 1251, 1252-53 (8th Cir. 1980) (carrying passengers for hire, supervising their alcohol consumption and providing safe means of disembarking all "related to" traditional maritime activity); *Bay Casino, LLC v. M/V Royal Empress,* 199 F.R.D. 464 (E.D.N.Y. 1999) (riverboat casino which provided alcohol to passenger who then injured persons in another car on his way home "may well have a disruptive effect on maritime commerce").

Similarly, another Louisiana riverboat casino which provided excessive amounts of alcohol to a patron who then killed several individuals in another car on his way home, including an infant, was held to

have the potential to disrupt maritime commerce. *Young, et al. v. Players Lake Charles, LLC,* 47 F.Supp.2d 832 (S.D. Tx. 1999) (citing *Their v. Lykes Bros., Inc.,* 900 F.Supp. 864, 866 (S.D. Tx. 1995)). In *Young*, the court wisely explained:

> [w]hile Defendants are nominally in the business of selling alcohol, it is clear that alcohol sales are merely incidental to **Defendants' primary purpose – the creation of a party atmosphere in which patrons are encouraged to freely spend their money gambling and then hit the road when they have exhausted their funds, regardless of their physical condition. Defendants are essentially giving alcohol away in express furtherance of that goal, arguably under the smug misconception that Louisiana law insulates them from the predictable and tragic consequences.**

Id. at 837 (emphasis added). The court instructed that "describ[ing] the incident on an 'intermediate level of possible generality,' . . . this incident can be described as a potentially negligent condition affecting passengers aboard the vessel. It is not difficult to imagine a slightly different scenario from the case at bar in which an intoxicated passenger falls down a stairway or into the water." *Id.* at 835 (citing *Meyer v. Carnival Cruise Line* [1994 WL 8320006] (N.D. Cal. 1994) at *1) (admiralty jurisdiction existed over action where plaintiff consumed too much alcohol aboard cruise ship and fell off a stairway, as such

incident *could* have a disruption of maritime commerce if rescue crews had to locate and save the passenger or search for his body). *See also Quinn v. St. Charles Gaming Co., Inc.*, 815 So.2d 963, 967 (La. App. 3d Cir. 2002) ("provision of alcohol to passengers on board a vessel could *possibly* have a disruptive effect on maritime commerce such as where a large party of passengers become inebriated injuring themselves or other patrons or fall overboard causing a disruption to maritime commerce due to search and rescue operations" and found jurisdiction under the Admiralty Extension Act).

b. THE M/V BOOMTOWN BELLE IS CLOSELY RELATED TO ACTIVITY TRADITIONALLY SUBJECT TO ADMIRALTY LAW.

"[A]s long as . . . the putative tortfeasor was engaged in traditional maritime activity, the allegedly wrongful activity will "involve" such traditional maritime activity." *Grubart,* 513 U.S. 527, 541, 115 S.Ct. 1043, 1052. Thus, "[n]avigation of boats in navigable waters clearly falls within substantial relationship [and] ***storing them at a marina on navigable waters is close enough***, whereas in flying an airplane over the water [or] in swimming, the relationship is too attenuated." *Id.* at 540 (emphasis added) (citations omitted).

In Missouri, a riverboat casino continuously moored dockside on the Mississippi River and carrying

2500 passengers was struck by three barges which had just hit a nearby bridge, setting the riverboat casino adrift. *See* CNN story, 4/5/98 at www.rbbi.com. The riverboat casino, which had no motor and had been moored "for decades", floated downstream for approximately 500 feet before and nearly ran into another bridge, was rescued by a towboat, and passengers reported "freaking out" and "looking for anything that would float in the water in case we had to jump off". *Id.* Clearly, even a continuously moored riverboat casino has a connection to maritime activity.

In Louisiana, the *Quinn* court held that riverboat casinos in Lake Charles have "a substantial relationship to a traditional maritime activity" such to provide recovery for plaintiffs' injuries. *Quinn*, 815 So.2d at 967-68. In that case, a passenger on board two riverboat casinos in the Lake Charles area "consumed large amounts of alcoholic beverages" "which were provided free of charge", then drove home, killing the driver of an oncoming car. *Id.* at 965. In applying admiralty jurisdiction to plaintiff's claims, the court held "[w]e have no difficulty in finding that the general character of the activity at issue shows a substantial relationship to a traditional maritime activity. The duties owed by vessel owners to their passengers have long been found a traditional maritime concern." *Id.* at 968. *See also Bay Casino*, 199 F.R.D. at 466 (regarding plaintiffs' injuries suffered after intoxicated riverboat casino patron driving home struck their car, "there is a 'substantial

relationship to traditional maritime activity' as courts have recognized that torts aboard entertainment vessels, including cruise ships, sightseeing ships, and casino boats satisfy the traditional maritime activity requirement") (citing *Young*, 47 F.Supp.2d at 835; *Palmer v. Fayard Moving & Transportation Corp.*, 930 F.2d 437, 441 (5th Cir. 1991); *Butler v. American Trawler Co.*, 887 F.2d 20, 21-22 (1st Cir. 1989); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 (1st Cir. 1988); *Luby v. Carnival Cruise Lines*, 633 F.Supp. 40, 41 n.2 (S.D. Fl. 1986)).

In the case sub judice, the United States Army Corps of Engineer clearly recognized the impact on maritime commerce the M/V BOOMTOWN BELLE could have, which is why it is requiring it to be removed from the Harvey Canal during a hurricane. This is not a "freak" case of a plane, a swimmer, or rear-end collision while waiting for a ferry, which was what was intended to be expelled from admiralty jurisdiction by usage of the "connection" test. Simply, this is a vessel in navigable waters, which is closely related to traditional maritime activity. The M/V BOOMTOWN BELLE easily satisfies the second *Grubart* prong for admiralty jurisdiction as it has a "connection with maritime activity." The incident at issue, providing excessive amounts of alcohol to patrons, has the potential to disrupt maritime commerce.

CONCLUSION

In conclusion, plaintiffs' claims fall under admiralty jurisdiction pursuant to the Admiralty Extension Act. The defendant M/V BOOMTOWN BELLE satisfies both prongs for finding admiralty jurisdiction – "location" plus "connection to maritime activity". As for location, the defendant is a "vessel in navigable waters", as it is a watercraft legally required by Louisiana law to remain "capable of navigation" lying afloat in the Harvey Canal, a navigable waterway. The M/V BOOMTOWN BELLE's ability to sail is a "practical possibility and not merely theoretical", as not only is it capable of navigation, but it is required to set sail upon "gale force winds" during a hurricane. As for "connection to maritime activity," the provision of alcohol has the "potential to disrupt maritime activity" such as if a patron were to fall overboard or otherwise cause the navigable waterway to be closed for a period of time; additionally, the duties owed by a vessel to its patrons have long been held to be a traditional maritime concern. Wherefore, plaintiffs, Jeffrey C. Bourgeois, individually and on behalf of Dale Bourgeois, Mark J. Bourgeois, individually and on behalf of Dale Bourgeois, Rebekah L. Bourgeois, individually and on behalf of Dale Bourgeois, pray that their writ application be granted, the decision of the Louisiana Supreme Court and/or the Louisiana Fifth Circuit Court of Appeal be reversed, and that the decision of the district court for the 24th Judicial District Court be reinstated.

Plaintiffs further pray for all other general and equitable relief to which they are entitled and which this Honorable Court is competent to grant.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

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Application For Writs

No. 09-C-243

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

APR-1 2009

/s/ Mary Legnon
Deputy Clerk

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. ORE, M/V BOOM TOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

IN RE BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELEWARE [sic], M/V BOOMTOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE JUNE B. DARENSBURG, DIVISION "C", NUMBER 651-937

Attorneys for Relator:

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A. Mark Flake
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401 Whitney Avenue
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(504) 832-9898

John F. Young, Jr.
Attorney at Law
P. O. Box 8288
Metairie, LA 70001
(504) 836-6571

WRIT GRANTED; JUDGMENT RENDERED

(See attached)

Gretna, Louisiana this 21st day of May, 2009.

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. ORE, M/V BOOM TOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

NO. 09-C-243

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WRIT GRANTED; JUDGMENT RENDERED

Defendants, Boomtown, LLC of Delaware, Pinnacle Entertainment, Inc. of Delaware, M/V BOOMTOWN BELLE II, and Louisiana A-1 Gaming, a Louisiana Partnership in Commendam (hereinafter "Boomtown") filed a Motion for Partial Summary Judgment requesting a dismissal of claims asserted under general maritime law stemming from a wrongful death/survivor action filed by Jeffery [sic] C. Bourgeois, Mark J. Bourgeois, and Rebekah L. Bourgeois (hereinafter "Plaintiffs"), major heirs of Dale Bourgeois, who was killed in an alcohol-related, single vehicle accident after leaving the casino.

Plaintiffs filed a cross-motion for partial summary judgment requesting that the trial court make a finding that general maritime/admiralty law applied to their actions against Boomtown.

The trial court rendered judgment on February 12, 2009, which was signed on March 2, 2009. In that judgment, the trial court denied Boomtown's motion for partial summary judgment, and granted Plaintiffs' motion for partial summary judgment, finding that "plaintiffs' claims are well founded under the admiralty and general maritime law of the United States and further that the Admiralty Extension Act applies in this case." On April 1, 2009, Boomtown filed the instant writ application with this Court requesting supervisory review of the trial court's rulings.

We grant this writ of review to examine the trial court's rulings. Appellate courts review summary judgments *de novo* under the same criteria governing the district court's consideration of whether summary judgment is appropriate. *Industrial Indemnity Company of the Northwest v. Central National Insurance Company of Omaha*, 99-2535 (La.App. 1 Cir. 12/22/00), 775 So.2d 1246, 1250-1251, *writ denied*, 01-0225 (La. 4/12/01), 790 So.2d 1. A motion for summary judgment shall be granted only if there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

In the present case, there are no factual disputes. In reviewing legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and renders judgment on the record. *State, Louisiana Riverboat Gaming Commission v. Louisiana State Police Riverboat Gaming Enforcement Division,* 95-2355 (La.App. 1 Cir. 8/21/96), 694 So.2d 316, 319.

For the following reasons, we make our writ peremptory and render partial summary judgment declaring that the M/V BOOMTOWN BELLE was not a "vessel" under general maritime law at the time of the accident. In order for Plaintiffs to prevail on a tort claim under the general maritime law, Plaintiffs must establish that the tort claim has a sufficient connection with maritime activity. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 539-540, 115 S.Ct. 1043, 1051 (1995). Under *Grubart*, the tortious conduct must be "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply to the suit at hand." *Id.* In the case before us, Plaintiffs allege, in their wrongful death/survivor action, that Boomtown is liable, at least in part, for their father's motor vehicle accident because Boomtown served alcohol to him, even after he was allegedly impaired, on the night of his accident. Plaintiffs have not proved that their claims are based on any traditional maritime activity as defined in the case law.

For general maritime law to apply, the evidence must reflect that the vessel in question was in navigation or capable of navigation. There is no dispute that the Boomtown casino is located on a barge, which is permanently moored to a dock located on the Harvey Canal in Harvey, Louisiana. In fact, Louisiana law now *prohibits* a casino barge from sailing if gaming activities are being conducted, and mandates that the barge remain permanently docked in order to maintain a casino license. La. R.S. 27:65(B)(1)(c).[2]

Although Plaintiffs contend that the barge is a vessel because it is in the water, Boomtown established that the barge is permanently attached to land by "dolphins welded to steel pilings." Moreover, the vessel receives utilities from "land-based sources," which are fixtures permanently attached to the vessel. Although Boomtown does possess an operable diesel engine, jurisprudence holds that permanently or indefinitely moored watercraft "as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 494, 125 S.Ct. 1118, 1127 (2005). "A watercraft is 'not capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered incapable of transportation or movement." *Id.* Based on the foregoing, we cannot say

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[2] La. R.S. 27:65 was amended by Act 3 of the First Extraordinary Session of 2001.

that the Plaintiffs have sufficiently disputed Boomtown's contention that the barge has not been "in navigation" since 2001. They have not established "vessel" status to trigger the application of general maritime law to this case.

Additionally, plaintiffs allege that their cause of action falls under the Admiralty Extension Act, 46 U.S.C.A. § 30101. The Admiralty Extension Act, however, does not relieve plaintiffs of the obligation of proving a sufficient connection to maritime activity. We note again that the facts neither indicate that the casino is a vessel nor establish a nexus between Boomtown's alleged conduct and traditional maritime activity. Accordingly, the Admiralty Extension Act does not apply to Plaintiffs' action.

Upon review, we find that the trial court erred in its rulings as a matter of law. For the foregoing reasons, we find that, as a matter of law, Boomtown is not a vessel in navigation. We, therefore, vacate the trial court's denial of partial summary judgment, in favor of Boomtown, grant partial summary judgment in favor of Boomtown, and dismiss Plaintiffs' claims asserted under general maritime law/admiralty jurisdiction. Furthermore, under our supervisory jurisdiction, we vacate the trial court's grant of partial summary judgment in favor of Plaintiffs for the foregoing reasons.

Gretna, Louisiana, this 21st day of May, 2009.

/s/ SMC
JUDGE SUSAN M. CHEHARDY

/s/ CEM
JUDGE CLARENCE E. MCMANUS

/s/ JGG
JUDGE JUDE G. GRAVOIS

TWENTY-FOURTH JUDICIAL DISTRICT
COURT PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 651-937 **DIVISION "C"**

JEFFREY C. BOURGEOIS, ET.AL.
VERSUS
BOOMTOWN, LLC. OF DELAWARE, ET.AL.

DATE FILED: _____ /s/ _____
DEPUTY CLERK

JUDGMENT

(Filed Mar. 2, 2009)

The Motion for Partial Summary Judgment of defendants, Boomtown, LLC of Delaware, Pinnacle Entertainment, Inc., of Delawre [sic], M/V Boomtown Belle, II, and Louisiana A-1 Gaming, a Louisiana Partnership in Commendam (hereinafter "Boomtown") and the Cross Motion for Partial Summary Judgment of plaintiffs, Jeffrey C. Bourgeois, individually and on behalf of Dale Bourgeois, Mark Bourgeois, individually and on behalf of Dale Bourgeois, Rebekah L. Bourgeois, individually and on behalf of Dale Bourgeois (hereinafter "plaintiffs") came for a hearing before Judge June Darensburg on February 12, 2009.

Present were:

1. John F. Young, Jr.
   Hailey, McNamara, Hall, Larmann
   & Papale, LLP
   Suite 1400
   One Galleria Blvd.
   Metairie, LA 70001
   Counsel for plaintiffs, Jeffrey C. Bourgeois,
   et al

2. L. Eric Williams, Jr.
   Williams Law Office, LLC
   3021 35th Street, Ste. B
   Metairie, LA 70001
   Counsel for plaintiffs, Jeffrey C. Bourgeois,
   et al

3. A. Mark Flake
   401 Whitney Avenue
   Suite 500
   Gretna, Louisiana 70056
   Counsel for defendants, Boomtown LLC
   of Delaware, *et al*

After considering the Motions, memoranda, exhibits attached thereto, and argument of counsel;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Partial Summary Judgment of defendants, Boomtown LLC of Delaware, *et al* is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Cross-Motion for Partial

Summary Judgment of plaintiffs, Jeffrey C, Bourgeois, *et al* is granted.

The Court held that plaintiffs' claims are well founded under the admiralty and general maritime law of the United States and further that the Admiralty Extension Act applies in this case.

Read and Rendered on February 12, 2009, Signed in Gretna, Louisiana, this 2nd day of March, 2009.

/s/ June Berry Darensburg
JUDGE JUNE BERRY DARENSBURG

The Supreme Court of the State of Louisiana

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, AND RENEE B. BOURGEOIS NO. 2009-CC-1357

VS.

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. ORE, M/V BOOM TOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

IN RE: Bourgeois, Dale; Bourgeois, Jeffrey C. et al.; Bourgeois, Mark; Bourgeois, Rebekah L.; Bourgeois, Renee B.; – Plaintiff(s); Applying For Supervisory and/or Remedial Writs, Parish of Jefferson, 24th Judicial District Court Div. C, No. 651-937; to the Court of Appeal, Fifth Circuit, No. 09-C-243;

September 25, 2009

Denied.

JTK

CDK

BJJ

JPV

JLW

GGG

BJ

JENNIFER ANN BREAUX

VERSUS

ST. CHARLES GAMING COMPANY, INC., d/b/a ISLE OF CAPRI CASINO, and ZURICH AMERICAN INSURANCE COMPANY

FILED: 12-10-07

NO. 2005-000272, DIV. "D"

14th JUDICIAL DISTRICT COURT

PARISH OF CALCASIEU

STATE OF LOUISIANA

/s/ [Illegible]
DEPUTY CLERK

JUDGMENT

On November 15, 2007, the Court considered in open court with oral argument by all parties the motion for summary judgment that St. Charles Gaming Company, Inc. filed on July 20, 2007, which sought to dismiss plaintiff Jennifer Ann Breaux's general maritime law claims in this case.

Having considered all the pleadings and arguments of all counsel, the Court rules that although there were no genuine issues of material fact present concerning St. Charles Gaming Company, Inc.'s motion for summary judgment, the Court funds that for the reasons stated at the hearing on this matter the Crown casino is a vessel for purposes of the general maritime law, and St. Charles Gaming Company, Inc.'s motion for summary judgment is denied.

[Lake Charles, La., December 10, 2007.]

/s/ Robert L. Wyatt
THE HONORABLE
ROBERT L. WYATT

U.S. Department of Homeland Security

United States Coast Guard [LOGO]

201 Hammond Highway
Metairie, LA 70005
Staff Symbol: S
Phone: (504) 846-6184
Fax: (504) 846-6196

Commander
United States Coast Guard
Sector New Orleans

3006
July 13, 2009

President Aaron Broussard
Jefferson Parish
1221 Elmwood Park Blvd, Suite 1002
Jefferson, LA 70123

Dear President Broussard:

Based on events that occurred during Hurricanes Gustav and Katrina, the Coast Guard has proposed a regulation which would prohibit floating vessels from being present in the Harvey Canal, from the Lapalco Bridge to the intersection of the Harvey Canal and the Algiers Canal, before a hurricane. Simply put, prior to the arrival of storm force winds, all floating vessels must be removed from the Harvey Canal or sunk in place. This includes the Boomtown Casino. This proposal is meant to protect the Harvey Canal levee (and eventually the new floodwall) from damage by vessels that may be moved by a storm surge. The U.S. Army Corps of Engineers has requested that the Coast Guard extend the Regulated Navigation Area (RNA) to the Algiers Canal, as well.

I have taken this regulatory action because the Louisiana Office of Coastal Protection and Restoration implored the Coast Guard to require evacuation of all floating vessels from the Inner Harbor Navigation Canal area, in New Orleans. However, their letter did not make a similar request for the Harvey and Algiers Canals. I have attached their letter and the Coast Guard's response for your information. My predecessor, Captain Stroh, met with members of the Office of Coast Protection and they recommended the additional measures to protect the floodwalls of the Harvey Canal.

Their request did not include protection of the levees, but only the floodwalls, nor did they seem concerned with the potential for damage from land-based objects which might be floated by a storm surge and rammed into the levees and floodwalls. At present, only a levee provides flood protection from the waters of Harvey and Algiers Canals. Does that mean that the regulation is not required until a floodwall is built? My observation is that a levee may be damaged by floating vessels in a storm surge in the same way as a flood wall.

These restrictions and the addition of Algiers Canal will have a negative economic impact on the businesses along the Harvey and Algiers Canals. Some businesses may choose to permanently relocate from the canals. However, in my opinion, the economic impact to the businesses pales compared to the economic impact of a flooded city.

I would very much appreciate hearing your thoughts and guidance on the matter. I have discussed the matter with Mr. Gerald Sporab of the Southwest Louisiana Flood Protection Authority. I would be happy to discuss this further with you, the council, the Levee Board, or whoever may help sort this out. Please do not hesitate to contact me at 504-628-4169 or Edwin.m.stanton@uscg.mil.

Sincerely,

/s/ Edwin M. Stanton
EDWIN M. STANTON
Captain, U.S. Coast Guard
Captain of the Port,
New Orleans

[LOGO] **US Army Corps of Engineers**
Team New Orleans

West Bank and Vicinity Hurricane Protection

Official Project Name
West Bank and Vicinity, New Orleans, LA Hurricane Protection Project

Location
The project is located on the west bank of the Mississippi River in the vicinity of New Orleans and in Jefferson, Orleans and Plaquemines Parishes.

Purpose
The project will reduce the risk of storm surges from Lake Cataouatche, Lake Salvador, and other waterways leading to the Gulf of Mexico.

Status

Post-Katrina legislation authorized and funded 100-year level flood protection for the areas on the west bank of the Mississippi River. The existing WBV project features will be replaced, raised, or otherwise enhanced as necessary to achieve the increased protection. A new addition to the WBV system is the Harvey Canal floodgate, completed in August 2007, which protects residents and businesses north of the gate. To reduce the risk of storm surge to the south, floodwalls along the Harvey Canal are under construction and should be complete in 2010. Currently,

3.1 of the 3.5 miles of floodwall are under construction with a completion date scheduled for August 2010. The fourth of five Harvey Canal floodwall contracts was awarded in July 2008. The remaining contract is scheduled for award in September 2008; designs are currently being finalized.

While levees along the Algiers Canal are currently being raised to previously authorized levels, an alternative for 100-year protection is being considered. A navigable floodgate and pumping station in the Algiers Canal or Gulf Intracoastal Waterway would eliminate the need to raise significant portions of the area's levees. The best option will be selected by October 2008.

The alignments of levees and floodwalls at the Oakville eastern tie-in are currently being determined. Construction should begin in early 2009.

Fronting protection and backflow prevention will be provided at the numerous non-federal pumping stations in Orleans, Jefferson, and Plaquemines, that are within the alignment of protection to round out the 100-year level of flood protection for the West Bank.

* * *

Features

* * *

• Harvey Canal floodgate – A major surge protection feature, the floodgate provides a closure across the canal and provides hurricane surge

protection to residents and businesses north of the gate. It is located at Lapalco Boulevard and has been operational since August 2007.

• Floodwalls east of Harvey Canal – No federal protection has previously existed along the east bank of Harvey Canal, making this area the most vulnerable on the West Bank. About 3.5 miles of floodwalls and one mile of levee are under construction along the east bank of the Harvey Canal. In addition, 2.5 miles of levee on the west bank are being raised to previously authorized elevations.

• There are several proposed modifications to the protection system in the Harvey and Algiers area that could facilitate the construction of the 100-year risk reduction (1% probability) work. These include raising all of the levee and floodwalls along the canals to the higher elevations required, or construction of a new gated structure south of the existing protection system.

* * *

[LOGO] **United States of America**
Department of Homeland Security
United States Coast Guard

Expiration Date: 30 Jan 20

IMO Number:

Certification of Inspection

Vessel Name	Official Number	Call Sign	Service
Boomtown Belle II	1028319	WCX8800	Passenger (Inspected)

Hailing Port	Hull Material	Horsepower	Propulsion
Harvey LA	Steel	3600	Diesel Electric

Place Built	Delivery Date	Date Keel Laid	Gross Tons	Net Tons	Wt	Length
Braithwaite, LA United States	24Mar 1995	19May 1994	R-3615 I-1D507	R-2758 I-3152		R-318 I-318

Owner		Operator
Louisiana-I Gaming 4132 Peters Road Harvey LA 70058 United States	PO Box 1385	Westbank Riverboat Services, Inc. 4100 General Degaulle Drive Aurora Village Suite B4 New Orleans LA 70131 United States

This vessel must be manned with the following licensed and unlicensed personnel. Included in which there must be 0 certified lifeboatmen, 0 certified tankermen, 0 HSC type rating, and 0 GMDSS Operators.

1 Master	0 Ordinary Seaman
0 Chief Mate	6 Deckhands
0 2nd Mate/OICNW	1 Chief Engineer
0 3rd Mate/OICNW	0 1st Asst. Engr/2nd Engr.
0 Master & 1st Class Pilot	0 2nd Asst. Engr/3rd Engr.
0 Mate & 1st Class Pilot	0 3rd Asst. Engr.
1 Lic. Mate/OICNW	0 Lic. Engr.
0 1st Class Pilot	0 QMED/Rat
0 Radio Officer(s)	1 Oilers
0 Able Seamen/ROANW	3 Watchmen

In addition, this vessel may carry 2341 passengers, 137 other persons in crew, 0 persons in addition to crew, and no others
Total persons allowed: 2491

Route Permitted and Conditions of Operation:

– – – Rivers – – –

The conditions of operation and manning are based on the vessel being moored in the Harvey Canal. Prior to getting underway, contact OCMI New Orleans.

At all times when passengers are embarked the pilothouse shall be manned by a qualified member of the crew.

Any passenger or other person confined to the holding cell shall be under the constant supervision of a

crewmember who shall have the capability to immediately release the passenger in any emergency.

Three designated watchman shall be stationed in passenger accessible areas during the nighttime as required by 46 CFR 78.30-15. Deckhands and/or security personnel may be utilized as watchmen.

Vessel security personnel duties are limited to passenger safety, crowd control, lifesaving, and firefighting only.

Adult passengers only.

Oilers may be non-certified.

While the vessel operates in continuously-moored status at the Boomtown Dock in Harvey Louisiana the following manning modifications apply:

(1) A licensed Mate may be substituted with a Deckhand, trained as a member of the crew, provided this Deckhand receives the appropriate training. In addition, the completion and documentation of annual refresher training by this deckhand is required to maintain this reduced level of manning.

(2) The Chief Engineer may be substituted with a Qualified Member of the Engineering Department (QMED), so long as a licensed Chief Engineer remains on call at all times.

– – – Hull Exams – – –

Exam Type	Next Exam	Last Exam	Prior Exam
Drydock	22Nov2007	20Jan2006	22Nov2002
Internal Structure	22Nov2007	20Jan2006	22Nov2002

--- Inspection Status ---

Pressure vessels

Type	Location	Previous	Last	Next
Air Receiver	Manufacturer: Manchester	08Feb2000	02Feb2005	02Feb2010
Air Receiver	Manufacturer: Manchester	08Feb2000	02Feb2005	02Feb2010
Other	Manufacturer: Magnum Fire & Safety	08Feb2000	02Feb2005	02Feb2010

Lifesaving

Number of Davits/2

Lifeboat/ Raft ID	Full Wgt Test	Light Wgt Test	Falls Rnwd	Falls End/ End
1	15Feb 2005	15Feb 2005	15Feb 2005	–
2	15Feb 2005	15Feb 2005	15Feb 2005	–

--- Lifesaving Equipment ---

	Number	Persons		Required
Total Equipment for		2491	Life Preservers (Adult)	2491
Lifeboats (Total)	0	0	Life Preservers (child)	0
Lifeboats (Port)*	0	0	Ring Buoys (Total)	12
Lifeboats (Starbd)*	0	0	With Lights*	4
Motor Lifeboats*	0	0	With Line Attached*	2

Lifeboats w/Radio*	0	0	Other*	0
Rescue Boats/ Platforms	2	0	Immersion Suits	0
Inflatable Rafts	0	0	Portable Lifeboat Radios	0
Life Floats/ Buoyant App	0	0	Equipped with EPIRB? (*included in totals)	No

– – – Fire Fighting Equipment – – –

Number of Fireman Outfits/	0	Number of Fire Pumps/	2

Hose information

Qty	Diameter	Length
32	1.5	75
4	2.5	75

Fixed Extinguishing Systems

Capacity	Agent	Space Protected
225	Carbon Dioxide	Emergency Generator Room
2000	Carbon Dioxide	Main Machinery Room

Fire Extinguishers – Hand portable and semi-portable

Qty	Class Type
32	A-II
20	B-II
1	B-III
3	B-V

With this Inspection for Certification having been completed at New Orleans, LA, the Officer in Charge [Illegible]. New Orleans certified the vessel, in all respects is in conformity with the applicable vessel inspection regulations prescribed thereunder.

Annual/Periodic/Quarterly Reinspections

Date	Zone	A/P/Q	Signature
01May07	-NEWMS-	-Q	-/s/ [Illegible]
-9Aug 07	-NOLA	-Q	-/s/ [Illegible]
-6Nov7	-SECNBLA	-Q	-/s/ [Illegible]
-	-	-	-

This certificate issued by:

/s/ J Scott Paradis
J.S. PARADIS, COMMANDER, USCG
Officer in Charge, Marine Inspection

Sector New Orleans
Inspection Zone

HLSX 01-2770 **ORIGINAL**

Regular Session, 2001

HOUSE BILL NO. 2022

BY REPRESENTATIVE DOWNER

(Filed Jan. 9, 2002)

GAMBLING/RIVERBOAT: Revises the definition of a riverboat

AN ACT

To amend and reenact R.S. 27:44(23) relative to riverboat gaming; to revise the definition of a riverboat; to provide that riverboat includes a continuously moored vessel determined to be removed from navigation; to require compliance with fire safety standards; to require annual inspections; to require compliance with certain criteria; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 27:44(23) is hereby amended and reenacted to read as follows:

§44 Definitions

When used in this Chapter, the following terms shall have these meanings:

* * *

(23) "Riverboat" means a vessel which either:

(a) Carries a valid Certificate of Inspection issued by the United States Coast Guard with regard to the carriage of a minimum of six hundred passengers and crew on designated rivers or waterways within or contiguous to the boundaries of the state of Louisiana; or

(b) ~~Carries a valid Certificate of Inspection from the United States Coast Guard for the carriage of a minimum of six hundred passengers and crew.~~ Is a continuously moored vessel which has been determined by the United States Coast Guard to be continuously docked and removed from navigation.

(i) For the purposes of this Chapter, a continuously moored riverboat vessel shall not be required to carry a valid Certificate of Inspection issued by the United States Coast Guard. The continuously moored vessel shall comply with the fire safety standards (1) contained in the National Fire Protection Association, NFPA Standard 307.

* * *

(ii) The licensee at its expense shall cause to be conducted annually by a third party organization an inspection of the continuously moored riverboat vessel for compliance with the fire and safety standards contained in Item (i) of this Subparagraph in addition to such other standards as are required by the United States Coast Guard for such vessels

including but not limited to hull integrity. the inspector

* * *

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

U.S. Department of Homeland Security

United States Coast Guard [LOGO]

1615 Poydras Street
New Orleans, LA 70112
Staff Symbol: (spv)
Phone: (504) 565-5086
Fax: (504) 589-4244

Commander
United States Coast Guard
Sector New Orleans

5720
14 January 2009
2009-022

Williams Law Office, LLC
3021 35th Street
Suite B
Metairie, LA 70001
Att: Eric Williams

RE: M/V BOOMTOWN BELLE II, OFFICIAL NUMBER 1028319

Mr. Williams,

This letter is in reply to your Freedom of Information Act request of clarification dated January 08, 2009 for the M/V BOOMTOWN BELLE II, Official Number 1028319. In response to clarification to question number four, The M/V BOOMTOWN BELLE II was continuously moored in accordance with the Certificate of Inspection and the vessel could navigate or set sail as needed with the proper preparations made which includes contacting the OCMI New Orleans prior to getting underway.

If you have any questions regarding this matter, please contact LT Tonya Lim at the above telephone number.

Sincerely,

/s/ S.R. Keel

S.R. KEEL
Lieutenant Commander,
U.S. Coast Guard
Senior Investigating Officer
By direction

U.S. Department of Homeland Security

United States Coast Guard [LOGO]

1615 Poydras Street
New Orleans, LA 70112
Staff Symbol: (spv)
Phone: (504) 565-5086
Fax: (504) 589-4244

Commanding Officer
U.S. Coast Guard
Sector New Orleans

5720
07 January 2009
2009-022

Williams Law Office, LLC
3021 35th Street
Suite B
Metairie, LA 70001
Att: Eric Williams

RE: M/V BOOMTOWN BELLE II, OFFICIAL NUMBER 1028319

Mr. Brown,

This letter is in reply to your Freedom of Information Act request of October 31, 2008 for the M/V BOOMTOWN BELLE II, Official Number 1028319. In response to your question number one, the vessel had a valid Certificate of Inspection issued from the U.S. Coast Guard on July 09, 2007. In response to your question number two, it is unknown if the vessel was capable of navigation on July 09, 2007. In response to your question number three, the Harvey Canal is a navigable waterway of the United States.

In response to your question number four, the vessel was permanently moored on July 09, 2007.

In accordance with the guidelines set forth 49 CFR Part 7, Subpart F, the fee for processing this request is $12.29. Please attach a copy of this letter to your check or money order, **payable to the Treasury of the United States** and send to:

U.S. Coast Guard
1615 Poydras Street
Suite 700
New Orleans, LA 70112
Attn: FOIA FEES

If you have any questions regarding this matter, please contact LT Tonya Lim at the above telephone number.

Sincerely,

/s/ S.R. Keel

S.R. KEEL
Lieutenant Commander
U.S. Coast Guard
By direction of the Officer
in Charge
Marine Inspection

SUPREME COURT OF LOUISIANA

NO. 2009 CC 1357

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS

Applicants/Plaintiffs

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. ORE, M/V BOOMTOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

Respondent/Defendant

OPPOSITION TO APPLICATION FOR SUPERVISORY WRITS TO REVIEW THE RULING OF THE FIFTH CIRCUIT COURT OF APPEAL, DOCKET NO. 09-C-243 CONCERNING THE RULING OF THE 24th JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON DIVISION C, DOCKET NO. 651937 HONORABLE JUDGE JUNE BERRY DARENSBERG, PRESIDING

Respectfully submitted,

GAUDRY, RANSON, HIGGINS & GREMILLION, LLC

/s/ Daryl A. Higgins
DARYL A. HIGGINS (#6868)
A. MARK FLAKE (#18214)
401 Whitney Avenue, Suite 500
Gretna, Louisiana 70056
Telephone: (504) 362-2466
Facsimile: (504) 362-5938
Attorneys for Boomtown, L.L.C. of Delaware, Pinnacle Entertainment, Inc. of Delaware, M/V BOOMTOWN BELLE II and Louisiana A-1 Gaming, a Louisiana Partnership in Commendam

* * *

The casino has not been used as a seagoing vessel since April 1,2001, when the change in the law became effective, and has been permanently moored to land at its present location ever since.[24] There is no plan to move the casino; rather, the intent is to continue to use it as an indefinitely moored floating casino.

* * *

---

[24] See Exhibit B Affidavit of Reynold Gaspard, Paragraphs 2, 3 and 4.

U.S. Department of Homeland Security

United States Coast Guard [LOGO]

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: CG-5413
Phone: (202) 372-1545
Fax: (202) 372-1830
Email:

Commandant
United States Coast Guard

Apr. 10, 2009

Ms. Elizabeth Ann Wills, P.E.
Deputy Director of Implementation
Office of Coastal Protection and Restoration
P.O. Box 44027
Baton Rouge, LA 70804-4027

Dear Ms. Wills,

On behalf of Admiral Allen, this is in response to your letter of April 7, 2009, requesting that the Coast Guard mandate that all vessels be moved out of certain waterways in the Lower Mississippi River prior to the onset of a tropical storm. After conferring with Coast Guard officials in the New Orleans area, we are confident that your concerns are already being addressed. Coast Guard Sector New Orleans is taking significant steps to mitigate the risk to the most vulnerable areas of New Orleans. These areas include the Inner Harbor Navigation Canal (IHNC) and a portion of the Harvey Canal.

Coast Guard Sector New Orleans officials met with the Southeast Louisiana Flood Protection Authority on January 16, 2009, to discuss areas of concern for

the upcoming hurricane season. In attendance for the Southeast Louisiana Flood Protection Authority were Mr. Tim Doody, Mr. Bob Turner and Mr. John Barry. In response to concerns raised at this meeting, the Coast Guard will take all actions necessary to prohibit all vessels from being in an area 1000 feet east of the IHNC Surge Reduction Barrier projected location west through the Gulf Intracoastal Waterway and IHNC out to Lake Ponchartrain and the Mississippi River. Furthermore, all vessels will be prohibited from the Harvey Canal between Lapalco Boulevard Bridge and the intersection of the Harvey Canal and the Algiers Alternate Route of the Intracoastal Waterway. These designated areas shall not be used a safe haven. These requirements will be in effect 24 hours prior to expected gale force winds through post storm landfall, or other conditions as determined by the Captain of the Port. If necessary, the Captain of the Port is prepared to issue specific orders directed at lingering vessels.

These requirements will be part of the Sector New Orleans Maritime Hurricane Contingency Port Plan (MHCPP) which will be updated prior to the 2009 Hurricane Season. A copy of the MHCPP may be viewed at:

http://homeport.uscg.mil/mycg/portal/ep/portDirectory.do?tabId=1&cotpId=39.

Coast Guard Sector New Orleans has already been working with – and will continue to work with – federal, state and local officials and the maritime

industry in developing changes to the Maritime Hurricane Contingency Port Plan. On March 18, 2009, Sector New Orleans held a Maritime Hurricane Contingency Port Plan work group meeting that was attended by numerous federal, state, and local officials and the maritime industry.

The Coast Guard is dedicated to ensuring the safety of navigation in the New Orleans area and will continue to work to evaluate areas of high risk and assist in protecting the people of New Orleans. If you have any questions, please feel free to contact Sector New Orleans Captain of the Port, Captain Lincoln Stroh at (504) 846-6184.

Sincerely,

/s/ Wayne A. Muilenburg
WAYNE A. MUILENBURG
Captain, U.S. Coast Guard
Office of Waterways Management
By Direction

TWENTY-FOURTH DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

JEANETTE G. MULLER — CASE NO.: 582-836

VERSUS — DIVISION: "E"

BOOMTOWN OF DELAWARE, LOUISIANA GAMING ENTERPRISES, INC., LOUISIANA 1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

* * *

(Filed Jan. 22, 2009)

The deposition of DIAN DAVIS, given in the above-entitled cause, pursuant to the following stipulation, before Dorothy N. Gros, a Certified Court Reporter, authorized to administer oaths of witnesses pursuant to Section 961.1 of Title 13 of the Louisiana Revised Statutes of 1950, as amended, reported at Boomtown Casino, 4132 Peters Rd., Harvey, Louisiana 70058, on Wednesday, October 11, 2006, beginning at 3:00 p.m.

[2] APPEARANCES:

LAW OFFICE OF LYNN ERIC WILLIAMS, JR.
(BY: SCOTT W. SMITH, ESQ.)
826 Focis Street, Suite 100
Metairie, Louisiana 70005
For: Jeanette G. Muller

LAW OFFICE OF A. EDWARD CANGELOSI
(BY: A. EDWARD CANGELOSI, ESQ.)
126 N.E. Eglin Parkway
Fort Walton Beach, Florida 32548
(850) 664-2705
For: Boomtown of Delaware

REPORTED BY: DOROTHY N. GROS, CCR
CERTIFIED COURT REPORTER

* * *

[29] BY MR. SMITH:

Q. Is Boomtown's policy for cocktail servers basically load the tray as much as you can handle?

A. No.

Q. What's the policy regarding loading a tray?

A. Boomtown's policy is to service your customers within 20 to 30 minute intervals and that's the basic requirement. So if you want to go out there with five drinks on a tray, fine, once you serve the customers. If you want to go out there with 10 drinks on a tray, it's up to the person that serves the customers.

* * *

[41] Q. And basically, there's the requirement of serving a customer every 20 to 30 minutes?

A. Customers every 20 to 30 minutes.

* * *

[57] BY MR. SMITH:

Q. Get them served every 20 to 30 minutes.

A. Yes. And work at your pace.

Q. Keep them drinking and gambling.

A. Keep them happy, you know.

* * *

[60] BY MR. SMITH:

Q. Three finals for the same incident meaning if I got three finals for not serving someone every 20 minutes, I am terminated?

MR. CANGELOSI: After three verbals and then a written verbal, okay? So, I'm just trying to condense it into that. She gave you the whole spectrum.

BY MR. SMITH:

Q. Okay. Is that your policy or the Boomtown policy?

A. That's Boomtown policy.

* * *

No. 09-756

Supreme Court, U.S.
FILED
JAN 26 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS,

Petitioners,

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE II AND LOUISIANA 1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED FOR REVIEW

The issue which applicants seek review is whether federal admiralty law or Louisiana law applies to a tort which allegedly occurred at the Boomtown Casino, a continuously moored floating casino.

The Louisiana Fifth Circuit Court of Appeal, relying on the U.S. Supreme Court decisions in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043 (1995) and *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005), ruled that the applicants had failed to establish "vessel" status to trigger application of general maritime law to this case.[1] This ruling is consistent with decisions of the U.S. Fifth Circuit Court of Appeals and Louisiana Federal District Courts which have consistently ruled that indefinitely moored floating casinos are not "vessels" for purposes of establishing federal admiralty jurisdiction.[2]

There are no legitimate writ grant considerations as set forth in Supreme Court Rule 10 which warrant the granting of a writ by this Court as is shown below.

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[1] See Louisiana Fifth Circuit Court of Appeal Judgment, Petitioners' App , at p. 5-7.

[2] See *Pavone v. Mississippi Riverboat Amusement Corporation, et al.*, 52 F.3d 560 (5th Cir. 1995), *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp 2d 795 (E.D. La 2003), *Martin v. Boyd Gaming Corp* , 374 F.3d 375 (E.D. La. 2004) and *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006)

II. PARTIES TO PROCEEDINGS AND DISCLOSURE STATEMENT PER RULE 29.6

The caption to the case contains the names of all parties in the case. The ownership of the corporate parties is as follows:

1) Louisiana 1 Gaming, a Louisiana partnership in commendam, is owned as follows:

Boomtown, L.L.C. of Delaware (General Partner) – 5%

Boomtown, L.L.C. of Delaware (Limited Partner) – 90%

Pinnacle Entertainment, Inc. of Delaware (Limited Partner) – 5%

2) Boomtown, L.L.C. of Delaware is owned as follows:

Pinnacle Entertainment, Inc. of Delaware – 100%

3) Pinnacle Entertainment, Inc. of Delaware is owned as follows:

Publicly traded; no current owner of 10% or more.

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III. OPINIONS BELOW

Boomtown filed a Motion for Summary Judgment in the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana, asserting the lack of federal maritime/admiralty jurisdiction over this case. The motion was supported by affidavits establishing the undisputed facts concerning vessel status. Petitioners filed a Cross-Motion for Summary Judgment asserting that federal jurisdiction existed. The Trial Court granted summary judgment on petitioners' behalf and denied respondents' Summary Judgment Motion finding that petitioners' claims "are well founded under the admiralty and general maritime law of the United States . . . "[3]

Boomtown filed a writ application to the Louisiana Fifth Circuit Court of Appeal. The Fifth Circuit Court of Appeal granted the writ and reversed the Trial Court's Judgment in favor of petitioners and granted Boomtown's motion holding that maritime jurisdiction does not exist in this case because "as a matter of law, Boomtown is not a vessel in navigation."[4]

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[3] See Judgment of the Trial Court, Petitioners' App., at p 9-11.

[4] See Judgment of the Louisiana Fifth Circuit Court of Appeal, Petitioners' App., at p. 1-8.

Petitioners sought a writ from the Louisiana Supreme Court which was denied on September 25, 2009.[5]

Petitioners now seek a writ from this Court to review the ruling of the Louisiana Fifth Circuit Court of Appeal on the issue of vessel status.

IV. BASIS FOR JURISDICTION

Petitioners bring this petition for writ of certiorari pursuant to this Court's supervisory powers under 28 U.S.C. §1257.

V. STATUTES

The statutes involved in this matter, 28 U.S.C. §1257, La. R.S. 27:65(B)(1)(c) and 46 U.S.C. §30101, are set out verbatim in the petitioners' petition.

VI. STATEMENT OF THE CASE

On July 9, 2007 at approximately 9:15 p.m., Dale Bourgeois, a 56-year-old man, left the Boomtown Casino and thereafter drove his vehicle into a ditch adjacent to Peters Road striking a culvert. Due to injuries sustained in the collision, Mr. Bourgeois died within three to five minutes of the accident. An

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[5] See Writ Denial of the Louisiana Supreme Court, Petitioners' App., at p 12-13.

autopsy performed on Mr. Bourgeois determined that Mr. Bourgeois suffered a lacerated aorta, among other internal injuries, resulting in his death. A lab analysis routinely performed confirmed that Mr. Bourgeois had significant blood alcohol content at the time of his death. Also found in his blood was the cocaine metabolite, benzoylecgonine, indicative of recent cocaine ingestion and impairment.[6] The petitioners' allegations directed toward Boomtown are solely limited to allegations that employees of Boomtown served alcohol to Mr. Bourgeois contributing to his intoxication and ultimate death.

There are no allegations that the Boomtown Casino was being used as "a means of transportation on water" at the time of the accident. In fact, it is undisputed that the Boomtown Casino has not sailed and has been permanently moored since April, 2001 when Louisiana's gaming laws were changed prohibiting the sailing of casino vessels and authorizing only dockside gaming. Since 2001, the amended version of Louisiana Revised Statutes 27:65 requires that all river boat casinos located in Jefferson Parish

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[6] There is nothing in the record to support the petitioners' assertion that the decedent entered the Boomtown sober as asserted on p 16 of the Application for Supervisory Writ of Review. Rather, the coroner, Dr. Fraser MacKenzie, testified in his deposition, at p. 10, lines 13-20; p. 12, lines 15-25; p 13, lines 7-16 and p. 14, lines 1-5 that the decedent tested positive for narcotics, including cocaine

only conduct gaming "while it is docked and the licensee shall not conduct cruises or excursions."[7]

When this law took effect, the Boomtown Casino stopped gaming cruises, was permanently moored to land by dolphins welded to steel pilings and became a continuously moored dockside casino.[8] Utilities including water, telephone lines, sewer lines, cable television and data processing lines were all permanently attached to the vessel from land-based sources.[9] The entrance to the casino is fully enclosed and appears to be a part of the shore-side buildings to which the casino is attached.

When the law was changed to prohibit gaming cruises, Boomtown requested manning modifications be granted by the Coast Guard. In response, the Coast Guard allowed Boomtown to substitute a licensed mate with a deckhand "[b]ecause **the vessel will not be navigating on a waterway.**"[10] The Coast Guard recognized "that **the duties of deckhands have been diminished by *the removal of the vessel from navigation***" and allowed a reduction in the

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[7] La R.S. 27:65(B)(1)(c) as amended and added by Act 3 of the First Extraordinary Session of 2001.

[8] See Affidavit of Reynold Gaspard, Respondent's App , at p 1-2

[9] See Affidavit of Reynold Gaspard, Respondent's App., at p 1-2

[10] See U.S. Coast Guard letter dated May 17, 2001, Respondent's App , at p 4-5.

number of deckhands from eight to six.[11] Since that time, the Coast Guard Certificates of Inspection have mandated that the casino operate with a reduced crew and in a continuously moored status at the Boomtown Dock in Harvey, Louisiana.[12] The certificates specifically require that: **"[t]he conditions of operation and manning are based on the vessel being moored in the Harvey Canal."**[13] The certificate provides that: "[w]hile the vessel operates in a continuously moored status . . . the following manning requirements apply . . . "[14] Should the Boomtown "return to underway passenger service," the U.S. Coast Guard would have to be contacted and shown "compliance with all applicable regulations for the operation on the specific route intended and comply with standard manning requirements."[15]

Petitioners contacted the U.S. Coast Guard in January of 2009 and were informed that the Coast Guard did not know if the Boomtown Casino was capable of navigation on July 9, 2007, the date of the accident; however, the Coast Guard specifically stated that **the Boomtown Casino "was permanently**

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[11] *Id*

[12] See Certificate of Inspection, Petitioners' App., at p. 22-27

[13] See Certificate of Inspection, Petitioners' App., at p. 23.

[14] See Certificate of Inspection, Petitioners' App., at p 24.

[15] See U S Coast Guard letter dated May 17, 2001, Respondent's App., at p 4-5 and U.S Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31.

moored on July 9, 2007."[16] Unhappy with the response, petitioners requested a clarification of what the Coast Guard meant when it referred to the casino as "permanently moored."[17] The Coast Guard explained that: "[t]he M/V Boomtown Belle II was continuously moored in accordance with the Certificate of Inspection . . . "[18] The Coast Guard agreed with the petitioners that the casino theoretically "could navigate or set sail as needed with the proper preparations made."[19] Thus, it is clear that the U.S. Coast Guard does not agree with the petitioners' assertion that the Boomtown Casino is capable of navigation as it is.

While this matter was pending before the Louisiana Supreme Court, petitioners asserted, for the first time, their argument that the U.S. Coast Guard was considering a proposed regulation that would require that the Boomtown be removed from its slip if a storm entered the Gulf of Mexico; therefore, in theory, the Boomtown may have to be moved from its dock in the future. Petitioners' argument was based upon a letter that they obtained concerning the proposed

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[16] See U.S. Coast Guard letter dated January 7, 2009, Petitioners' App., at p. 33-34.

[17] See U.S Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31-32

[18] See U S. Coast Guard letter dated January 14, 2009, Petitioners' App., at p. 31.

[19] *Id.*

regulation.[20] Since that time, the U.S. Coast Guard has agreed to allow the Boomtown to remain in its slip during storms as long as it adds mooring lines, has a tugboat on standby and implements other procedures.[21] Thus, even the petitioners' theoretical reason for the Boomtown to sail in the future has been removed. Since 2001, there has been and is no plan to move the casino; rather, the intent is to continue to use it as a permanently moored floating casino.[22]

The Boomtown is and has been, since 2001, permanently moored and practically incapable of being used as a means of transportation on water. Any use as a means of transportation is purely theoretical. Thus, the Boomtown Casino is not a vessel so as to trigger the application of general maritime law.

VII. MEMORANDUM/ARGUMENT

Application of Maritime Law

a) For maritime law to apply, there must be a connection to maritime activity.

In order for general maritime/admiralty jurisdiction and law to apply to a tort allegedly committed

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[20] See U.S. Coast Guard letter dated July 13, 2009, Petitioners' App., at p. 16-18.

[21] See U.S. Coast Guard letter dated August 28, 2009, Respondent's App., at p. 3.

[22] See Affidavit of Reynold Gaspard, Respondent's App., at p. 1-2.

on a water craft, it is essential for the petitioners to establish that the tort claim has a sufficient connection with maritime activity.[23] In order to determine if there is a sufficient connection with maritime activity for admiralty jurisdiction to apply, the court must (1) assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce; and, (2) determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.[24] The key inquiry in the connection test is whether the allegedly tortious activity is "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply to the suit at hand."[25]

Traditionally, torts occurring on a "vessel" in navigation are held to meet the connection test and maritime/admiralty jurisdiction applies. The issue then becomes whether the Boomtown Casino is, in fact, a "vessel" in navigation which would trigger admiralty jurisdiction at the time that the petitioners' alleged cause of action arose.

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[23] *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

[24] *Id.*

[25] *Id.*

b) The BOOMTOWN BELLE II is not a "vessel" in navigation.

In *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005), this Court granted certiorari in order to resolve confusion about how to determine whether a water craft is a "vessel" for purposes of establishing admiralty jurisdiction. In addressing whether a water craft is a "vessel," this Court reasoned that:

> A ship long lodged in a dry dock or shipyard can again be put to sea no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. **The question remains in all cases whether the water craft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one.**[26] [Emphasis added.]

As this Court made clear:

> Simply put, a water craft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.[27]

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[26] *Stewart v. Dutra Construction Co*, 543 U.S. 481, 496 (2005)

[27] *Id.*, at 494

This Court went on to point out that permanently or indefinitely moored water craft "as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) (floating casino was no longer a vessel where it 'was moored to the shore in a semi-permanent or indefinite manner'). . . ."[28] Pursuant to *Stewart*, the permanently moored Boomtown Casino's use as "a means of transportation on water" is not a practical possibility and is merely theoretical; therefore, the casino is not a "vessel" which would trigger the application of general maritime/admiralty law.

In rendering its decision, the Louisiana Fifth Circuit Court of Appeal correctly relied upon *Stewart* to reason that:

> [J]urisprudence holds that permanently or indefinitely moored watercraft "as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again." *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L.Ed.2d 932 (2005). "A watercraft is 'not capable of being used' for marine transport in any meaningful sense if it has been permanently moored or otherwise rendered

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[28] *Id.*, at 494.

incapable of transportation or movement" *Id.*[29]

The Fifth Circuit went on to rule that the petitioners had not established "vessel" status to trigger the application of general maritime law.

There is no conflict between the Louisiana Fifth Circuit's decision and this Court as claimed by the petitioners. Rather, the decision of the Louisiana Fifth Circuit Court of Appeal in this matter is based upon the well reasoned application of the law.

c) Since the Boomtown Casino is not a "vessel," there is no connection to maritime activity.

In the *Stewart* decision, this Court specifically cited the case of *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) as an example of a "floating casino" that was "no longer a vessel where it was moored to the shore in a semi-permanent or indefinite manner."[30] In the *Pavone* case, the U.S. Fifth Circuit Court of Appeal addressed the issue of whether an indefinitely moored floating casino was a vessel for purposes of establishing the application of general maritime law.[31] The Court

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[29] See Judgment of the Louisiana Fifth Circuit Court of Appeal, Petitioners' App., at p. 1-8.

[30] *Stewart*, at 494

[31] *Pavone*, at 568.

focused on whether the indefinitely moored casino, the BILOXI BELLE, had been "withdrawn from navigation" so as to no longer be considered a "vessel" in navigation for purposes of establishing maritime jurisdiction.[32] The Court ruled that the casino at issue "was removed from navigation" when it was indefinitely moored and was not a "vessel" for purposes of general maritime law.[33] It is interesting to note that the BILOXI BELLE casino had a contract "to tow the BILOXI BELLE to sheltered waters in the event potentially damaging weather is forecast . . . and was towed to sheltered waters on August 23, 1992, when Hurricane Andrew threatened."[34] Although there are some physical differences between the casino in *Pavone* and the Boomtown Casino, the finding that a casino which has been indefinitely moored loses its vessel status supports the ruling in this matter that the Boomtown was not a "vessel" for purposes of establishing admiralty jurisdiction.

In *Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795 (E.D. La. 2003), the captain of the TREASURE CHEST brought an action against the casino arising from injuries sustained while working at the casino. In attempting to determine plaintiff's legal remedy, the plaintiff argued that the TREASURE CHEST had a steel hull, raked bow, bilge pumps, ballast tanks, generator, self-propelled

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[32] *Id.*, at 568-569.

[33] *Id.*, at 570

[34] *Id.*, at 564.

engine, navigational aids, crew quarters, an operative pilot house, steering mechanism, life saving devices and a navigational crew and that it had made daily cruises since it began operating in 1994 until the law was changed in 2001.[35] The TREASURE CHEST's Coast Guard certificate required that the pilothouse be manned at all times that passengers were on board the casino.[36] The TREASURE CHEST was licensed as a passenger vessel and was required to have a master, able and ordinary seamen, a chief engineer and an oiler at all times.[37] The TREASURE CHEST conducted "man overboard" and fire drills periodically and fired up its engines.[38] The TREASURE CHEST had been moved two times since 2001 so that dredging of its berth could be done.[39] The Coast Guard's certificate of inspection was identical to the one issued prior to the change in the law in 2001 except that it designated that the boat be continuously moored.[40] Finally, the plaintiff argued that the TREASURE CHEST was connected to shore by cables which could be released fairly easily.[41] **The Boomtown Casino has been welded in place since 2001.**

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[35] *Hertz v Treasure Chest Casino, L.L.C.*, 274 F. Supp 2d 795, 797 (E.D. La. 2003).

[36] *Id*

[37] *Id.*

[38] *Id.*

[39] *Id.*, at 798

[40] *Id* , at 797

[41] *Id.*

The TREASURE CHEST's owners argued that the vessel was permanently moored and it had no intention of conducting any gambling cruises in the future.[42] The owners argued that the casino had only been moved two times since April 1,2001 for dredging purposes.[43] No gambling was conducted and no passengers were on board when the casino was moved for dredging.[44] The owners therefore contended that the TREASURE CHEST had been withdrawn from navigation and was no longer a "vessel" for purposes of establishing admiralty jurisdiction; therefore, general maritime law did not apply.

Judge Fallon of the U.S. District Court for the Eastern District of Louisiana found that the plaintiff's showing was insufficient to confer vessel status to the TREASURE CHEST.[45] The Court ruled "as a matter of law, that the TREASURE CHEST is not a vessel in navigation, and the plaintiff's claim is not within the admiralty jurisdiction."[46]

In the recent case of *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006), the Court was called upon to determine whether an indefinitely moored floating casino was a "vessel" for purposes of applying general maritime law. The plaintiff tripped

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[42] *Id.*, at 801.

[43] *Id.*, at 800.

[44] *Id.*

[45] *Id.*

[46] *Id.*, at 807

and fell while on the boat and was attempting to bring an action based upon unseaworthiness in admiralty.[47] The U.S. Fifth Circuit Court of Appeal noted that the crucial question regarding vessel status is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."[48] The Court found that the CROWN CASINO was indefinitely moored to the land by lines tied to steel pilings and, just as with the Boomtown Casino, that it received water, telephone lines, sewer lines, cable television and data processing lines attached to land-based sources.[49] Additionally, the casino had not been used as a seagoing vessel since March 28, 2001 when it was moored to its present location.[50] There was no plan to move the boat; rather, the intent was to use it as an indefinitely moored floating casino.[51] In upholding the Trial Court's granting of the defendant's motion for summary judgment, the U.S. Fifth Circuit Court of Appeal confirmed that "an indefinitely moored floating casino like the CROWN CASINO is not a 'vessel' for purposes of admiralty jurisdiction."[52]

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[47] *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 186 (5th Cir. 2006)

[48] *Id.*, at 187.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*, at 188

Here, as in *Pavone, Hertz* and *De La Rosa,* the facts and jurisprudence establish that a tort allegedly occurring on an indefinitely moored floating casino, such as the BOOMTOWN BELLE, is not sufficiently connected to maritime activity to trigger the application of general maritime jurisdiction or law.

d) The petitioners' reliance upon the cases cited in their memoranda is misplaced.

The petitioners have cited various cases from random venues in an attempt to support their position that the Boomtown Casino was a "vessel" at the time of the incident. The reliance on these cases is misplaced for the following reasons:

i) *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299, 1309 (11th Cir. 2008).

Petitioners cite the *Board of Commissioners* case in support of their position that the Boomtown Casino was a "vessel" at the time of the incident. However, the *Board of Commissioners* case concerned whether a maritime lien existed pursuant to a maritime contract.[53] The 11th Circuit acknowledged that "courts have historically tended to more narrowly construe

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[53] *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans,* 535 F.3d 1299, 1309 (11th Cir. 2008).

the definition of a vessel" in a maritime tort case than in a maritime lien case.[54] Thus, the 11th Circuit acknowledged in *Board of Commissioners* that they were applying a broader standard than the maritime tort standard in their decision.

Additionally, the M/V BELLE OF ORLEANS which was involved in the 11th Circuit case was not permanently moored when the damages accrued that were the subject of the maritime liens occurred. Rather, the M/V BELLE OF ORLEANS had broken loose from its moorings and had a collision with the piers, docks and other structures during Hurricane Katrina's landfall causing damages to itself and the marina.[55] The damages in the *Board of Commissioners* case were due to the fact that the water craft had broken loose and was not moored in its slip.[56] A case which sought damages caused by a loose water

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[54] *Id.*, at 1309.

[55] *Id.*, at 1302 and 1304.

[56] In *In re: Silver Slipper Casino Venture, L.L.C.*, 264 Fed.Appx 363, 366, 2008 WL 276072 (5th Cir. (Miss.)), 2008 A.M.C. 909, the U.S. Fifth Circuit Court of Appeal ruled that the Silver Slipper Casino was not a "vessel" for purposes of establishing admiralty jurisdiction despite being torn from its moorings during Hurricane Katrina. The Court rejected the argument that the casino was "definitely in navigation" when it struck a hotel and ruled that "the unfortunate fact that Hurricane Katrina blew the casino across the highway and into a hotel did not suddenly transform a non-vessel into a practically navigable watercraft." In the matter *sub judice*, the Boomtown Casino was, at all relevant times, permanently moored in its slip adjacent to the Harvey Canal and was never practically capable of navigation

craft is distinguished from the case now before the Court.

Finally, because the *Board of Commissioners* case involved a maritime lien rather than a tort, the 11th Circuit chose not to give any weight to the case of *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) which this Court referenced in the *Stewart* case. In fact, the 11th Circuit made clear that it refused to follow *Pavone* despite the fact that this Court had referenced *Pavone* with approval in the *Stewart* case.[57] The 11th Circuit's decision in the *Board of Commissioners* case does not provide support for the petitioners' assertion that maritime law applies to this matter.

ii) *Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 832 (S.D. Tex. 1999).

Petitioners also cite the *Young* case in support of their position that maritime law applies in this case. The *Young* case arose prior to the change in the law in 2001, a time when Louisiana casinos were required to conduct gaming excursions. The court specifically noted that "the existence of admiralty jurisdiction over this action is not in dispute at this time."[58]

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[57] *Board of Commissioners of the Orleans Levee District*, at 1308.

[58] *See Young v. Players Lake Charles, L.L.C.*, 47 F. Supp. 832 (S.D. Tex. 1999), at 834

Again, the law now and at the time of the subject incident prohibited the Boomtown Casino from sailing.

iii) *Tagliere v. Harrah's Illinois Corporation*, 445 F.3d 1012 (7th Cir. 2006).

Petitioners cite the *Tagliere* case out of Illinois for the proposition that admiralty jurisdiction applies even if a river boat casino was indefinitely moored to a pier. A review of the *Tagliere* decision reveals that the 7th Circuit did not rule on whether admiralty jurisdiction existed; rather, the Court merely remanded the matter to the trial court to determine whether admiralty jurisdiction applied.[59] The *Tagliere* opinion raised various questions concerning when a casino is permanently moored and merely concluded that "[t]hese are matters for exploration on remand."[60]

There is a post-*Stewart* case from the U.S. Seventh Circuit that has ruled on the "vessel" status of an indefinitely moored casino. In *Earls v. Belterra Resorts, Indiana, L.L.C.*, 439 F. Supp. 2d 884 (S.D. Ind. 2006), admiralty jurisdiction was found not to exist concerning an accident on an indefinitely moored casino because it was determined not to be a "vessel."

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[59] *Tagliere*, at 1016.

[60] *Id.*, at 1016.

iv) *Holmes v. Atlantic Sounding Company, Inc.*, 437 F.3d 441 (5th Cir. 2006).

Petitioners cite the *Holmes* case in support of their position that the Boomtown Casino was a "vessel" at the time of the subject incident. The barge at issue in the *Holmes* case was "moved from place to place to house and feed employees during dredging projects at various locations."[61] The barge had been used to transport equipment from dredge site to dredge site fourteen times in approximately twenty months.[62] Unlike the Boomtown Casino which has been removed from navigation for over six years, the barge in the *Holmes* case was used as a means of transportation on water. Thus, the *Holmes* decision is factually different and does not provide support for the petitioners' arguments concerning an indefinitely moored floating casino.

v) *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137 (2002).

Petitioners cite the Iowa case of *Horak* as support for their position. A review of *Horak* reveals that the case involved the appeal of a jury's verdict in an action brought under the Iowa Dram Shop Act, Iowa Code Section 123.92 (1999).[63] *Horak* provides no

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[61] *Holmes*, at 443

[62] *Id.*, at 449

[63] *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 140 (2002)

guidance for this Court in making a determination of the issues in this case.

vi) *Quinn v. St. Charles Gaming Co.*, 815 So.2d 963 (La. App. 3d Cir. 2002).

Petitioners cite the *Quinn* case as support for their argument that maritime law applies. As in the *Young* case, the *Quinn* case arose prior to the change in the law in 2001, at a time when casinos were required to sail. The *Quinn* Court opined that "[b]oth of these gambling casinos are vessels on navigable waters, since, at the time of this incident, they were required by law to conduct gambling operations during excursions onto the Calcasieu River and Lake Charles."[64] Again, the law now and at the time of the incident which is the basis of this case arose prohibited the Boomtown Casino from sailing. *Quinn* is distinguishable from the matter before the Court.

e) The Admiralty Extension Act does not confer admiralty jurisdiction when there is no connection to maritime activity.

The petitioners also argue that this claim falls under the Admiralty Extension Act. The Admiralty Extension Act does not confer admiralty jurisdiction

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[64] *Quinn*, at 966.

when there is no connection to maritime activity; rather, the act is used to extend the "locality" requirement. In *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1134-36 (5th Cir. 1981) the Court held that the Admiralty Extension Act does not provide an independent basis for jurisdiction.[65] The *Sohyde* decision was based upon the legislative history of the act and this Court's decision in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972).[66] The Court opined that:

> In sum, we find that the Admiralty Extension Act was intended to eliminate the inequities, and anomalies, resulting from the strict application of the locality rule in admiralty under then existing law. **The Act was not intended to grant claimants new substantive rights of recovery nor relieve them from jurisdictional constraints unrelated to locality a la Executive Jet imposed on general maritime tort claimants.** Accordingly, we find claims under the Admiralty Extension Act to be subject to the "maritime relationship" rule of Executive Jet. [Emphasis added.][67]

Therefore, the Admiralty Extension Act does not relieve the petitioners from the requirement of

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[65] See also, *Grotwell v. Hockman-Lewis, Ltd.*, 734 F.2d 734 (11th Cir. 1984).

[66] *Sohyde*, at 1135-36.

[67] *Id.*, at 1136

proving a sufficient *connection with maritime activity* in order to establish admiralty jurisdiction. Even under the Admiralty Extension Act, petitioners must show that the incident has a potential disruptive impact on maritime commerce and that the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. As is discussed above, there is no connection with maritime activity in this matter to confer admiralty/maritime jurisdiction in this case.

VIII. CONCLUSION AND PRAYER FOR RELIEF

This case is appropriate for summary judgment because there is no issue of material fact that Boomtown Casino is not a "vessel" for purposes of establishing admiralty jurisdiction. The Boomtown Casino has been removed from navigation and is practically incapable of being used as a means of transportation because it is welded into posts in a boat slip cut into the Harvey Canal and receives all major utilities from sources which are permanently attached from land to the vessel. Boomtown's Coast Guard Certificate of Inspection is based on Boomtown operating with a reduced crew and in a continuously moored status. The casino cannot legally conduct gaming cruises. There is no plan to ever use the Boomtown Casino as anything other than an indefinitely moored floating casino.

Since the Boomtown Casino is not a "vessel," any alleged tort occurring on the Boomtown Belle is not sufficiently connected to maritime activity to trigger admiralty jurisdiction or the application of general maritime law.

For these reasons, the Louisiana Fifth Circuit Court of Appeal was correct in its decision in this matter and that decision should not be disturbed.

Respectfully submitted,

GAUDRY, RANSON, HIGGINS
& GREMILLION, L.L.C.

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24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON

STATE OF LOUISIANA

NO.: 651-937 DIVISION C

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK J. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS

VERSUS

BOOMTOWN, L.L.C. OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE, II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM

FILED: _____ /s/ _____
DEPUTY CLERK

AFFIDAVIT IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF LOUISIANA

PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared:

Reynold Gaspard

A person of the full age of majority, domiciled in the Parish of Jefferson, State of Louisiana, who states that he has personal knowledge of the following:

1) He is currently employed by the Boomtown Casino in the position of Facilities Director working in this capacity since October 31, 2005.

2) That since April 1, 2001, Boomtown has not left its slip located off of the Harvey Canal.

3) That since April 1, 2001, the Boomtown Casino has been continuously moored in its boat slip located off the Harvey Canal.

4) That since April 1, 2001, the Boomtown Casino has been permanently moored to welded posts located in the boat slip cut into the Harvey Canal.

5) That since April 1, 2001, Boomtown cannot legally conduct gaming cruses [sic].

6) That Boomtown's Certificate of inspection by the United States Coast Guard requires it to remain in a continuously moored status.

7) That since April 1, 2001, Boomtown Casino has received its utilities including water, telephone lines, sewer lines, cable and data processing lines from land based sources which are permanently attached to the vessel.

8) That there is no plan to use the Boomtown Casino as anything other than an indefinitely permanently moored floating casino and that it is not and has not been a vessel in navigation since April 1, 2001.

/s/ Reynold Gaspard
Reynold Gaspard
Facilities Director
Boomtown Casino

SWORN TO AND SUBSCRIBED BEFORE ME, THIS 8th DAY OF DECEMBER, 2008.

/s/ A. Mark Flake
A. Mark Flake
Notary Public
La. Bar # 18244
My Commission Expires
Upon Death

U.S. Department of Homeland Security

[SEAL]

United States Coast Guard

Commander
United States Coast Guard
Sector New Orleans

201 Hammond Highway
New Orleans, LA 70005
Staff Symbol: s
Phone: (504) 846-6184
Fax: (504) 846-6196

16600
28 August 2009

Mr. Clifford D. Kortman
President, Pinnacle Design and Construction, LLC
Boomtown Casino
4132 Peters Road
Harvey, LA 70058

Dear Mr. Kortman:

I have received your appeal of my Captain of the Port Order 0899-09, to remove your vessel, M/V BOOM-TOWN BELLE II, from the Harvey Canal prior to the onset of storm winds from an impending hurricane. In response to your proposal, I am willing to grant approval of your appeal, subject to the following additional conditions:

1. In addition to all normal and emergency procedures you currently implement, the conditions proposed on page 15 of your appeal must be implemented.

2. All mooring wires, chains, or lines must be a minimum of one and one quarter inch in

diameter for wire rope, or have equivalent strength if chain or line and must be in good condition. Moorings must be capable of withstanding a 10.5 foot surge.

3. The standby towing vessel that you have described in Mr. Darden's letter of 31 August (attached) is acceptable. Your standby vessel must be radar and radio equipped. It must be immediately operational. The person in charge of the towboat must maintain a continuous radio guard on channels 67 and 16.

If you have questions or require further clarification, please contact me or LCDR William Daniels. I am at 504-846-6159. LCDR Daniels may be reached at 504-565-5044.

Sincerely,

/s/ E. M. Stanton
E. M. Stanton
Captain, U.S. Coast Guard
Captain of the Port,
New Orleans

Encl: Darden Letter of 31 Aug 09

U.S. Department
of Transportation

[SEAL]

United States
Coast Guard

Commanding Officer
U.S. Coast Guard
Marine Safety Office

1615 Poydras Street
New Orleans, LA
70112-1254
Phone: (504) 589-6273
Fax: (504) 589-4216

16711/BOOMTOWN
BELLE II
May 17, 2001

Westbank Riverboat Services, Inc.
Attn: Mr. Rolle J. Ducote Jr.
P. O. Box 740607
New Orleans, LA 70174

Subj: MANNING MODIFICATION REQUEST FOR M/V BOOMTOWN BELLE II, O.N. D1028319

Gentlemen:

This is in response to your letter dated April 16, 2001, requesting a manning reduction for the M/V BOOMTOWN BELLE II. Your request has been examined and found to provide an acceptable level of safety with the conditions noted below. In making this determination, I have given consideration to the characteristics of the vessel and its machinery plant, your stated intent to operate in a continuously moored status, and the proximity of city emergency services. The following comments apply:

1. Because the vessel will not be navigating on a waterway, your request to substitute licensed mate with a deckhand, trained as a member of the crew, is approved, provided this deckhand receives the training listed in your letter. The completion and documentation of annual refresher training by this deckhand is required to maintain this reduced level of manning.

2. Considering the limited operation of machinery onboard the vessel while moored (i.e. electrical power provided from shore), your request to remove the requirement for a licensed assistant engineer is approved only for routine operations while the vessel is moored. Likewise, you may use a non-certificated oiler to fill the oiler position in the engineering department.

3. Currently, your Certificate of Inspection (COI) requires eight deckhands and six security personnel. You also request permission to remove all deckhands while retaining the six security personnel. I recognize that the duties of the deckhands have been diminished by the removal of the vessel from navigation, but are nonetheless critical for the overall safety of the vessel and passengers. You may reduce the number of deckhands from eight to six. This is consistent with recent manning reductions for other continuously moored vessels of similar passenger load.

Appropriate entries will be made to the vessel's Certificate of Inspection to document these changes

and associated requirements. Should this vessel return to underway passenger service, you will be required to show compliance with all applicable regulations for operation on the specific route intended and comply with standard manning requirements.

If you have any questions on this matter, please contact Lieutenant Commander Cal Brown at (504) 589-4214.

Sincerely,

/s/ F. M. Paskewich
F. M. Paskewich
Commander, U.S. Coast Guard
Acting Officer in Charge
Marine Inspection

(3)

No. 09-756

Supreme Court, U S
FILED
FEB 9 – 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JEFFREY C. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, MARK BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS, REBEKAH L. BOURGEOIS, INDIVIDUALLY AND ON BEHALF OF DALE BOURGEOIS AND RENEE B. BOURGEOIS,

Petitioners,

v.

BOOMTOWN, L.L C OF DELAWARE, PINNACLE ENTERTAINMENT, INC. OF DELAWARE, M/V BOOMTOWN BELLE II AND LOUISIANA A-1 GAMING, A LOUISIANA PARTNERSHIP IN COMMENDAM,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, Fifth Circuit, State Of Louisiana

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ARGUMENT FOR GRANTING THE WRIT

Defendant's opposition brief in this case fully supports Petitioner's argument that conflicting decisions exist among and between federal and state courts as to whether a riverboat casino (built for navigation with a motor, captain, crew, and having navigated) but which remains dockside to conduct gaming activities constitutes a "vessel" under federal admiralty law. As Defendants cannot hide the conflicting decisions, instead it makes an attempt to distinguish a *few* of the "pro-vessel" cases from the "non-vessel" cases, then conclude that there is no "split" among circuits or conflicting decisions among courts throughout the country.[1] Nothing could be

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[1] **Courts finding "vessel" status for dockside riverboat casinos:** *Board of Commissioners of Orleans Levee District v. M/V Belle of Orleans*, 535 F 3d 1299 (11th Cir 2008); *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006); *Breaux v. St Charles Gaming*, Case No. 2005-000272 (14th JDC, La. 2007); *Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N E.2d 141, 146 (Ill 3rd Cir 2006); *In re AMGAM Ass'n*, 239 B.R. 737 (S.D. Miss 1999); *Credit Suisse First Boston Mortgage Capital, LLC v. Doris*, 102 F Supp 2d 709, 713 (N D. Miss. 2001) *See also Davis v Missouri Gaming Company d/b/a Argosy Riverside Casino*, 51 S.W. 3d 168 (Mo. App. W D. 2001) (Jones Act case wherein dockside riverboat casino "may" be a vessel).

Courts finding "no vessel" status for dockside riverboat casinos: *De La Rosa v St Charles Gaming Co* , 474 F 3d 185 (5th Cir 2006); *Pavone v Mississippi Riverboat Amusement Corp* , 52 F.3d 560, 570 (5th Cir 1995); *Davis v Players Lake Charles Riverboat*, 74 F. Supp. 2d 675, 676 (W.D. La. 1999); *In re Silver Slipper Casino Venture, LLC*, 264 Fed Appx 363 (5th Cir 2008) *See also* Jones Act cases finding "no vessel" status *Martin v. Boyd Gaming*, 252 F Supp. 2d 321

(Continued on following page)

further from the truth, and this issue is a legal "mess," begging for this Court's intervention to provide uniform recovery to riverboat casino plaintiffs.[2]

As will be clearly demonstrated below, Defendant's purported "distinctions" are not only

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(E.D. La. 2003); *Howard v Southern Illinois Riverboat Casino Cruises*, 364 F.3d 854 (7th Cir 2004); *Hertz v Treasure Chest Casino*, 274 F. Supp. 2d 795 (E D. La. 2003); *Watson v Indiana Gaming Co.*, 337 F Supp. 2d 951 (E.D. Ky 2004)

[2] Defendant further attempts to distract this Court from the pure legal issue of whether the M/V BOOMTOWN BELLE satisfies the jurisdictional requirements for maritime law by attempting to discredit the plaintiff with respect to the nature of his injuries *See* Defendant's Opposition at 3 ("Mr. Bourgeois had significant blood alcohol content at the time of his death. Also found in his blood was the cocaine metabolite, benzoylecgonine, indicative of recent cocaine ingestion and impairment") While Plaintiffs deny that the cause of plaintiff's death was anything other than alcohol intoxication pursuant to the policies of the M/V BOOMTOWN BELLE as confirmed the state trooper on the scene of the accident, that the nature of plaintiff's injuries are irrelevant in determining whether M/V BOOMTOWN BELLE satisfies the two-prong *Grubart* test for maritime jurisdiction under the Admiralty Extension Act. *See, e g , Tagliere v. Harrah's Ill Corp.*, 445 F.3d 1012 (7th Cir 2006) (casino patron's injury in falling off a stool "had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land. * * * There is, therefore, commonsense appeal . that the suit is not within admiralty jurisdiction. But the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear * * * Congress has extended the admiralty jurisdiction to 'all cases of . injury . . . caused by a vessel on navigable waters . . includ[ing] the vessel's . . furniture. [Plaintiff's] injury resulting from the defective stool . . was an injury caused by a vessel"); *Grubart, Inc v Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S Ct. 1043 (1985).

irrelevant, but actually false. Unequivocally, a circuit split exists, as well as numerous other inconsistent decisions among and between state and federal courts, as to whether a riverboat casino built for navigation but which conducts dockside gaming constitutes a "vessel" under federal law. ***It is imperative that this Honorable Court intervene to provide plaintiffs in these matters the uniform recovery which was intended by a federal body of law such as general maritime law.***

I. *PAVONE V. MISSISSIPPI RIVERBOAT AMUSEMENT CORP.*, 52 F.3d 560 (5th Cir. 1995) IS NOT DISPOSITIVE OF THE ISSUE OF VESSEL STATUS FOR RIVERBOAT CASINOS IN LOUISIANA AND HAS CREATED A CIRCUIT SPLIT AND INCONSISTENT DECISIONS ACROSS THE COUNTRY.

Defendant incorrectly states that in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118 (2005) this Court "specifically cited the case of *Pavone* . . . as an example of a 'floating casino' that was '***no longer a vessel*** where it was moored to the shore in a semi-permanent or indefinite manner'." *See* Defendant's Opposition at 11. However, this statement is highly misleading, as the structure in *Pavone* most likely was ***never*** a "vessel", and therefore did not "lose" vessel status as suggested (it could not lose what it did not have). Moreover, the Mississippi *Pavone* casino structure is not the same type of casino structure as the Louisiana M/V BOOMTOWN BELLE

at issue before this Court. *See, e.g., Davis v. Players Lake Charles Riverboat, Inc.*, 74 F. Supp. 2d 675 (W.D. La. 1999) (Louisiana district court noted the distinction between ***Louisiana*** riverboat casinos built for navigation and required to sail, versus the *Pavone* ***Mississippi*** casino structures which are nothing more than floating restaurants, bars and casinos, never built for navigation).

In *Pavone*, a Jones Act case, the structure called the BILOXI BELLE might have just as well been land-based, and is nothing more than a legal "ruse" for gaming not on "land". *Pavone*, 52 F.3d at 560. *Pavone* involved a fixed structure ***never*** built for navigation, ***never*** required to have navigated under state law, had no motor, captain, crew, pilot house (except for decoration), and was permanently attached to the shore in such a manner that you cannot tell the difference between the land and the shore when entering. *Id.* at 563-66. Casino structures in the state of Mississippi, such as in *Pavone*, by state law, ***are entirely different and distinct*** – and to the best of undersigned counsel's knowledge and belief, from any other jurisdiction in the United States – in that Mississippi permits gaming activities over water on non-navigable structures never required to navigate or carry passenger, ***and are nothing more than fixed structures built over water***. *Id.*

Specifically, the U.S. Fifth Circuit explained that

> the structure . . . is situated on a barge that was constructed at Morgan City, Louisiana,

for the express purpose of supporting ***a floating restaurant and bar*** [in] Texas. * * * After a while, [it] was re-outfitted as a casino, towed to Biloxi and renamed the Biloxi Belle. The BILOXI BELLE was moored to the shore by lines tied to sunken steel pylons that were filled with concrete. The first level of the BILOXI BELLE was connected to the pier by steep ramps, and the second level was joined to the shore-side building. * * * **The BILOXI BELLE has no engine, no captain, no navigational aids, no crewquarters and no lifesaving equipment. For visual effect only, the BILOXI BELLE is outfitted with a decorative pilot house containing no operating parts other than a single light switch . . . no steering mechanism. . . . Likewise a motorized but nonfunctional paddle wheel is affixed** [with] water outlets [to] product spray to give the appearance of function, but the heel rests permanently above the water **level and serves no propulsion function.** * * * **[T]he subject barge has never been used as a seagoing vessel to transport passengers, cargo, or equipment across navigable waters. Neither was it originally constructed to do so. The BILOXI BELLE employs no navigational or nautical crew; all**

> **workers thereon are employed solely in connection with the casino operation.**

Id.[3]

Conversely, the riverboat casino at issue in this case, the M/V BOOMTOWN BELLE, along with the riverboat casinos in the entire line of cases finding "vessel" status, ***are* wholly different structures than that in *Pavone*** – the M/V BOOMTOWN BELLE, along with the other watercraft in the "pro-vessel" cases, are all ***boats*** – built specifically for navigation, navigated and carried passengers, and are required ***to be fully capable of navigation at all times***. *See* Plaintiff's Application at 8-15, 19-27 (citing *Board of Commissioners of Orleans Levee District v. M/V Belle of Orleans*, 535 F.3d 1299 (11th Cir. 2008) (Louisiana dockside riverboat casino *is* a "vessel" under *Stewart*); *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006) (Illinois dockside riverboat casino admitted it was a "vessel" under the Seventh Circuit's criteria); *Booten v. Argosy Gaming Company d/b/a Alton Belle Casino*, 848 N.E.2d 141, 146 (Ill. 3rd Cir. 2006) (pursuant to *Stewart*, defendant riverboat casino is a "vessel," despite that it

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[3] Further, even courts within Mississippi declined to follow *Pavone* and found that the casino structures in Mississippi were "vessels" under federal admiralty law! *See, e.g., In re AMGAM Ass'n*, 239 B.R. 737 (S.D. Miss. 1999) (Mississippi riverboat casino *is* a "vessel" under federal admiralty law); *Credit Suisse First Boston Mortgage Capital, LLC v. Doris*, 102 F. Supp. 2d 709, 713 (N.D. Miss. 2001) (Mississippi riverboat casino is a "vessel" as defined by 1 U.S.C. Section 3).

"stopped cruising [in] 1999, the day after the law changed to allow gambling to occur [dockside] and has no plans to resume cruising, [because] [t]he Alton Belle is clearly capable of maritime transportation"); *Breaux v. St. Charles Gaming*, Case No. 2005-000272 (14th JDC, La. 2007) (Louisiana riverboat casino is a "ves-sel"). *See also Davis v. Missouri Gaming*, 51 S.W.3d 168 (W.D. App. Mo. 2001) (riverboat casino "may" be a "vessel" for Jones Act purposes because it was built for navigation and floated).

Nevertheless, the U.S. Fifth Circuit and its district courts thereunder have followed *Pavone* for the holding that navigable riverboat casinos in Louisiana are not "vessels," even for general maritime cases, simply because they remain dockside to conduct gaming activity, pointing to *Pavone*. *See, e.g., De La Rosa*, 474 F.3d at 185 (5th Cir. 2006) (pursuant to *Pavone*, Louisiana riverboat casino, built for navigation, navigated, and required at all times to be capable of navigation, was not a "vessel" under general maritime law); *Hertz v. Treasure Chest Casino*, 274 F. Supp. 2d 795 (E.D. La. 2003) (finding the rationale of Pavone "persuasive" and denied plaintiff's Jones Act claim, finding that Louisiana riverboat casino was not a vessel); *Ward v. Boy Gaming Corp.*, 2004 WL 422012 (W.D. La. 2004) (Louisiana riverboat casino not a "vessel" for Jones Act claim, citing *Pavone*).

However, ***failing to distinguish a Pavone-fixed structure – a structure wholly incapable of navigation and only decorated to look like an***

old-fashioned "paddlewheel" – versus a fully functioning seagoing vessel is akin to finding that a carnival cruise ship is no different than a hotel built on water. The U.S. Fifth Circuit line of cases applying *Pavone* to the navigational riverboat casinos have misapplied federal admiralty law, resulting in a circuit split, as well as inconsistent decisions among courts across the country on this issue.

II. DEFENDANT'S ATTEMPT TO DISTINGUISH PLAINTIFF'S "PRO-VESSEL" RIVERBOAT CASINO CASES ARE MISLEADING AND IRRELEVANT

A. *Tagliere v. Harrah's Ill. Corp.*, 445 F.3d 1012 (7th Cir. 2006).

Defendant argues that the *Tagliere* decision "did not rule on whether admiralty jurisdiction existed [and] remanded the matter". *See* Defendant's Opposition at 19 (citing *Tagliere*, 445 F.3d at 1016). However, this statement is misleading as the Defendant riverboat casino in *Tagliere* ***conceded*** ***"vessel" status after the ruling issued by the U.S. Seventh Circuit, and did not dispute the issue of maritime jurisdiction further!*** *See Tagliere v. Harrah's*, Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).[4] In *Tagliere*, the district court decision found

[4] Undersigned counsel contacted plaintiff's counsel in *Tagliere* to determine the outcome of the issue of "vessel" status

(Continued on following page)

that Defendant, Harrah's, a dockside riverboat casino, was a "vessel" under general maritime law, but dismissed plaintiff's claim on other grounds. *Tagliere*, 2005 WL 1126892 (N.D. Ill. 2005) at *2-3 ("[t]his Court concludes that the Harrah's Casino Riverboat is a vessel") (citing *Howard v. Illinois Riverboat Casino Cruises*, 364 F.3d 854, 856 (7th Cir. 2004). On plaintiff's appeal, the U.S. Seventh Circuit reversed the dismissal, implicitly finding that the riverboat casino ***did*** satisfy the second prong of the "nexus" test, but remanded in light of the recent *Stewart* decision by the U.S. Supreme Court, explaining that:

> [t]he difference between "permanently" and "indefinitely" [moored] in this context is vague and has not been explored by the parties. The *Stewart* case suggests that the boat must be permanently incapacitated from sailing. Yet maybe – by analogy to the difference between domicile and residence – a boat also is "permanently" moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only "indefinitely" moored. These are matters for exploration on remand.

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after the Seventh Circuit's remand. Plaintiff's counsel advised that after the U.S. Seventh Circuit issued its ruling,, counsel for Defendant appeared before the district court and advised that it conceded vessel status and would not contest the issue of maritime jurisdiction any further. *See Tagliere v. Harrah's*, Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).

Tagliere, 445 F.3d 1016. However, on remand, with the Seventh Circuit's factors articulated, **defendant Harrah's Riverboat casino conceded that it was a vessel and advised the district court it would not contest maritime jurisdiction any longer**! *See Tagliere v. Harrah's,* Case No. 04 C 5258, Docket Entry 7/17/06 (N.D. Ill. 2004).

B. *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans,* 535 F.3d 1299 (11th Cir. 2008).

Defendant further argues that *Belle of Orleans* is inapplicable because it a) "concerned whether a maritime lien existed [and] 'courts have historically tended to more narrowly construe the definition of vessel' in a maritime tort case than in a maritime lien case"; and because b) the Belle of Orleans boat had broke loose of its "permanent" moorings and therefore at that moment became a vessel. *See* Defendant's Opposition at 16-17. Defendants misquote the *Belle of Orleans* case, as it clearly says "courts have historically tended to more narrowly construe the definition of vessel in ***Jones Act cases***, ***NOT "maritime tort cases"*** as it tries to suggest to this Court. *See Belle of Orleans*, 535 F.3d at 1309. Additionally, the absurdity of Defendant's second argument is obvious – Defendant submits that any-time a boat breaks free of its "permanent" moorings, such as during a hurricane, it automatically converts to a "vessel" at that instant. Under this logic, anything that breaks free from land – such as sheet

piling being tossed during a hurricane – becomes a "vessel". Further, under defendant's logic, if the M/V BOOMTOWN BELLE should break free of its moorings tomorrow causing damages, a plaintiff *tomorrow* can recover under federal maritime law, but if injured *today* while tied to the dock, he cannot. This Court in *Stewart* clearly set forth a test which bestows "vessel" status upon any watercraft which is "capable of navigation" regardless of whether it was actually navigating at the time of the injury, not just "anything that floats". *See Stewart*, 543 U.S. at 494-95, 125 S. Ct. at 1127-28.[5]

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[5] Defendant attempts to distinguish two (2) additional riverboat casino cases (*Young* and *Quinn*) in the section of its brief that it argues that the M/V BOOMTOWN BELLE is not a "vessel" under the first "location" prong of the *Grubart* test However, *Young* and *Quinn* were clearly cited by plaintiff with respect to the ***second*** prong of the *Grubart* test for maritime jurisdiction under the Admiralty Extension Act test (***connection to maritime activity***) and are inapplicable and non-instructive as to the first "***location***" (***vessel status***) prong of the test. Defendant does not distinguish or address why these cases would not be instructed as to the second prong of the test and ignores that concept entirely. *See* Defendant's Opposition at 18, 20-21 (citing *Young v. Players Lake Charles, LLC*, 47 F. Supp. 832 (S D Tx. 1999); *Quinn v. St. Charles Gaming Co* , 815 So. 2d 963 (La App. 3d Cir 2002)).

C. *Horak v. Argosy Gaming Co.*, 648 N.W. 2d 137 (Ia. 2002)

Defendant claims that *Horak* "involved an action brought under the Iowa Dram Shop Act [and] provides no guidance for this Court." *See* Defendant's Opposition at 20-21. Once again, defendant's submission to this Court is misleading, as in *Horak*, the ***defendant*** riverboat casino **claimed that federal maritime law applied rather than state law**, and thus the court was required to determine whether the riverboat casino satisfied the "location" and "connection to maritime activity" *Grubart* two-prong test for maritime law to apply. *Horak*, 648 N.W.2d at 145-146. Notably, the court found that the defendant riverboat casino satisfied the two-prong *Grubart* test for maritime jurisdiction as it was a "vessel" and the activity at issue had a "connection to maritime commerce." *Id.* Accordingly, this case is instructive on that point.

CONCLUSION

In conclusion, plaintiffs urge this Court to grant its Petition for Writ of Certiorari and set the matter for oral argument to resolve once and for all the issue of whether a dockside riverboat casino constitutes a "vessel" under the Admiralty Extension Act. Plaintiffs submit to this Honorable Court that a boat which was constructed for navigation, navigated, and is required to remain fully capable of navigation for the carriage

of 600 or more passengers, is a "vessel" under the Admiralty Extension Act.

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